90-1068

No. _____

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

THE SOUTH HALF OF LOT 7 AND LOT 8, BLOCK 14, KOUNTZE'S 3RD ADDITION TO THE CITY OF OMAHA, etc., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the meaning of the term "any property . . . used in violation of" 18 U.S.C. § 1955 encompasses real property including the residences of the alleged violators.

2. Whether the procedures used to seize real property under the term "any property" in 18 U.S.C. § 1955(d) violate the probable cause requirement of the Fourth Amendment, the due process of law requirement of the Fifth Amendment, and the cruel and unusual punishment provision of the Eighth Amendment of the United States Constitution.

3. Whether the Complaints filed without Affidavits against the Defendant properties in this case and with no showing of probable cause, are sufficient as a matter of constitutional law.

4. Whether the forfeiture provision of 18 U.S.C. § 1955 requires a criminal conviction or some other procedure before it can be invoked.

PARTIES BELOW

The Petitioners are claimants to thirteen individual personal residences and buildings who filed Motions to Dismiss the Complaints filed by the Respondent, the United States.

The Petitioners are:

THE SOUTH HALF OF LOT 7 AND LOT 8, BLOCK 14, KOUNTZE'S 3RD ADDITION TO THE CITY OF OMAHA, etc., *et al.*,

LOT 98 IN RIDGEVIEW TERRACE, etc., *et al.*,

LOT 1, BLOCK 7, LEE VALLEY (2ND PLATTING), etc., *et al.*,

THE SOUTH HALF OF LOT 1, BLOCK 172, OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., *et al.*,

LOT 30, THE OAKS, AN ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., *et al.*,

THAT PART OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION TWENTY-NINE (29), etc., *et al.*,

LOT 114, THE OAKS, AN ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., *et al.*,

PARTIES BELOW – Continued

THE SOUTH 12 FEET OF THE EAST 137 1/2 FEET OF LOT 1, LOT 2 IN REPLAT OF THE WEST HALF OF LOT 2, BONFIELD ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., *et al.*,

LOT 4 IN REPLAT OF LOTS 42, 43 AND 44 IN HILLCREST ADDITION, AN ADDITION TO BELLEVUE, SARPY COUNTY, NEBRASKA, etc., *et al.*,

TAX LOT H, SECTION 6, TOWNSHIP 13 NORTH, RANGE 13 EAST OF THE 6TH P.M., etc., *et al.*,

WEST 135 FEET OF THE EAST 168 FEET OF THE SOUTH 65 FEET OF THE NORTH 140 FEET OF THE SOUTH 1/2 OF THE SOUTHEAST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 30, etc., *et al.*,

LOT 8, BLOCK 5, WEARNE PARK, AN ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., *et al.*

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No. _____

In The

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October Term, 1990

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, The South Half of Lots 7 and 8, Block 14, Kountze's 3rd Addition to the City of Omaha, etc., et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 3, 1990.

OPINIONS BELOW

On August 1, 1988, Judge Lyle E. Strom, of the United States District Court for the District of Nebraska, entered a Memorandum Opinion and Order granting claimants'

Motion to Dismiss forfeiture proceedings against certain real properties stating that Title 18 U.S.C. 1955(d) did not encompass real property.

The United States appealed the Order granting dismissal to the Court of Appeals for the Eighth Circuit. On June 1, 1989, the Eighth Circuit Court of Appeals affirmed the lower court's decision dismissing the Government's forfeiture Complaints.

The United States filed a Petition for Rehearing, en banc, which was granted. On August 3, 1990, the Court of Appeals for the Eighth Circuit, en banc, reversed all prior decisions and remanded the case to the lower court.

JURISDICTIONAL STATEMENT

Jurisdiction to review the decision of the Court of Appeals entered on August 3, 1990, rehearing en banc, by Writ of Certiorari is conferred upon this Court by 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

This case involves the following statutory provisions which are set forth in Appendix 72 through 81:

18 U.S.C. Section 1955(d)
18 U.S.C. Section 1961
18 U.S.C. Section 1963
21 U.S.C. Section 848

STATEMENT OF THE CASE

From March 3, through March 15, 1988, the United States filed complaints for forfeiture, *in rem*, against certain real properties in Omaha, Nebraska alleging that the properties were used in violation of 18 U.S.C., Section

1955. The complaints alleged that these properties were used for the purpose of conducting, financing, managing, supervising or owning all or part of an illegal gambling business in violation of Section 1955, and therefore, they were subject to forfeiture to the United States.

These real properties consist mainly of residential properties and some business buildings.

While the government's Complaints contain statutory language, no particulars of any federal criminal offense are alleged, other than the bare statutory requirements. The Complaints were filed without Affidavits, so there is no showing as to how this real property was used to violate 18 U.S.C. § 1955.

The United States next filed warrants for arrest for the properties, and notice of seizure which were personally served on the owners and all known claimants to the Defendant properties.

In all cases, persons and financial institutions having a claim to the properties filed claims with the District Court alleging their ownership interest.

In all but two of the cases, Defendants/Claimants (CV 88-0-214 and 88-0-218) filed Motions to Dismiss for the reason that § 1955(d) did not encompass "real property used in violation" of 18 U.S.C. § 1955.

This issue was presented to the District Court on briefs, and on August 1, 1988, the Court entered a Memorandum Opinion and Order granting the Motions to Dismiss.

In granting the Motions to Dismiss, the Court noting the statutory language, stated " . . . the Court notes it has 'some' scope for adopting a restricted rather than a literal or usual meaning of [the statutory language] where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the

statute." (citations omitted) Memorandum Opinion of District Court, Appendix 3.

Additionally, the Court examined the legislative history of 18 U.S.C. § 1961 (RICO), 21 U.S.C. § 848 (CCE), and 18 U.S.C. § 1955(d), noting that both 18 U.S.C. § 1961 and 21 U.S.C. § 848 were specifically amended by Congress in 1984 to include the forfeiture of real property as part of the Comprehensive Crime Control Act of 1983 designed to assist in the battle against racketeering and drug trafficking. However, Congress did not amend 18 U.S.C. 1955 to include real property, the Court noted.

The district Court concluded by finding it inconceivable that the intent of Section 1955 was to allow the government to seize a person's home, and that the words "any property" in Section 1955(d) do not encompass real property.

On August 4, 1988, the United States filed a Motion to Alter or Amend Judgment. The government argued that the Memorandum Opinion and Order were contrary to law and that the Court erred in determining that real property was not subject to forfeiture.

In denying the government's Motion to Alter or Amend, the District Court reiterated that the term "any property" as used in 1955(d) does not encompass real property, stating that the Court's ruling was not limited to residences and family homes, but any and all real property. (Dist. Ct. Memorandum Order, Appendix 8.)

The Court stated . . . "the instrumentalities of illegal gambling and the monies obtained from the operation of an illegal gambling business are the focus of the forfeiture provision in the statute. This conclusion is further buttressed by the language of Section 1955(d), which

states 'all provisions of law relating to the seizure, summary and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage or the proceeds from such sale . . . shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section . . . ' No reference to real property is included in that language." (Dist. Ct. Memorandum Opinion, Appendix 9.)

Following the denial of the Motion to Amend or Alter Judgment, the government filed Notice of Appeal to the Court of Appeals for the Eighth Circuit. On June 1, 1989, the Court of Appeals affirmed the District Court's holding, and found (1) that 18 U.S.C. 1955(d) did not encompass real property, and (2) that the procedures used to seize the real property in these cases were constitutionally deficient.

The Court of Appeals reiterated that . . . "forfeitures are not favored and should be enforced only when within both the letter and spirit of the law." (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 16).

The Court of Appeals first examined the customs law provision and noted that . . . "By their nature, the customs procedures adopted by the statute involve personal property and not real property. . . . However, it is true that the forfeiture provisions of the customs laws have been used by Congress to provide the forfeiture framework in some statutes which do specifically allow the forfeiture of real property, although the provisions were supplemented by additional provisions which better adapted the provisions to real property." (citations omitted) (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 17 and 18).

The Court concluded that the lack of the adoption of any supplemental provisions relating to real property in 1955(d) indicated that Congress expected the majority of forfeitures under this statute to be against personal property.

The Court then compared Section 1955 to other federal statutes which allows for the forfeiture of real property. The two statutes that ostensibly sanctioned the forfeiture of real property without specifically referring to "real property" were 18 U.S.C. § 1963(a), RICO, and 21 U.S.C. 848(a), CCE. The Court noted, however, that these statutes were amended in 1984 to specifically state within the statute that the property subject to forfeiture was real property. The Court decisions allowing real property forfeiture under these statutes occurred after the enactment of § 1955.

In reaching its decision that 18 U.S.C. 1955(d) did not include real property, the Eighth Circuit panel closely examined the legislative history of § 1955 for any evidence of Congressional intent.

The history of Section 1955 can be traced back to the "Illegal Gambling Business Control Act of 1969" introduced as Senate Bill 2022, 91st Congress., 1st Sess. The Court noted that in the hearings on S.2022, the inception of a forfeiture provision was initiated by a discussion between Senator John McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, and Mr. Will Wilson, Assistant Attorney General, Criminal Division. The discussion was as follows:

> Senator McClellan: I take it that you hope this legislation dealing with gambling will strike at the economic basis of organized crime. Now, would it be helpful to add to S. 2022 a forfeiture

> provision that would cover the equipment, adding machines, and money used in operating the illegal business establishment?
>
> Mr. Wilson: I think it would, yes.
>
> Senator McClellan: Give us some thoughts on this.
>
> Mr. Wilson: Well, we will do that and submit some language on that.

Mr. Wilson sent a letter to the committee proposing wording of the forfeiture provision. This letter was made part of the record of the hearings. In this letter Mr. Wilson specifically states . . . "I agreed at your suggestion to draft a forfeiture provision which would cover the equipment or money used in the operation of such an illegal gambling business."

The Court of Appeals found that this particularized legislative history established that Congress never intended that Section 1955 be used to seize real property. "Instead, it is clear to this court that the purpose of the provision was to be that represented by the Justice Department, a means of seizing the 'equipment or money used in the operation of' an illegal gambling business prohibited under section 1955." (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 25).

Alternatively, the Court then examined the failure of the Government to obtain a determination from a judicial officer that probable cause existed to seize the properties prior to the actual seizures. The Supreme Court had previously held in *Plymouth Sedan v. Pennsylvania* that the forfeitures sanctioned in § 1955(d) were clearly quasi-criminal and, therefore, came under Fourth Amendment protections. The Eighth Circuit Court herein held:

> " . . . , the need for adherence to the constitutional requirement of having a probable cause determination by a judicial officer is clearly

> established by the facts in this case. The failure to honor these rights allowed a five month seizure of citizens' homes and other real property based upon allegations devoid of specifics and on the basis of a statute which does not authorize the seizure or forfeiture of real property. Sanctioning such government activity would make a nullity and mockery of the Fourth and Fifth Amendment guarantees at issue here. This we refuse to do." (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 32).

The Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court dismissing the complaints.

The United States requested a rehearing, *en banc*, which was granted and the case was submitted on October 10, 1989. On August 3, 1990, the Court of Appeals for the Eighth Circuit, rehearing, *en banc*, issued a Memorandum Opinion reversing the two prior court decisions and remanding the case for further proceedings on the government's complaints for forfeiture.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Court of Appeals was incorrect in holding that the plain meaning of Section 1955(d) encompasses real property.

On June 1, 1989, the Court of Appeals for the Eighth Circuit affirmed, by way of a Panel Opinion, the District Court's judgment that the term "any property", as used in 18 U.S.C. § 1955(d), does not encompass real property:

> Section 1955(d) of 18 U.S.C. reads:
>
> (d). Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States of America. All provisions of law are relating to

> the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs law; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provision. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

In analyzing the Panel Opinion, the Court of Appeals for the Eighth Circuit, rehearing, *en banc*, Memorandum Opinion of August 3, 1990, which will be referred to as the En Banc Opinion, held that the plain meaning of the forfeiture provision settles the question that the words "any property" encompass real property within § 1955(d). (En Banc Opinion, August 3, 1990, Appendix 39.) However, within the same paragraph as the Opinion, the En Banc Court cites *United States v. Ron Pair Enters*, 109 S.Ct. 1026, 1031 (1989), stating Courts must enforce a statute according to its plain terms "except in the 'rare cases' [in which] [a] literal application . . . will produce a result demonstrably at odds with the intention of [the] drafters." This case is one of those cases where the Eighth Circuit's literal construction of the statute produces a

result demonstrably at odds with the intention of Congress because Congress did not expressly nor implicitly intend for § 1955(d) to apply to real property.

Section 1955 was enacted as part of the Organized Crime Control Act of 1970, Pub.L. 91-452. The Organized Crime Control Act also contained Racketeer Influenced and Corrupt Organizations (RICO) provisions, 18 U.S.C., 1961-68.

The Controlled Substance Act, Pub.L. 91-513, was enacted by Congress in 1970. The Controlled Substances Act includes provisions relating to continuing criminal enterprises (CCE) involving five or more people, 21 U.S.C., Section 848. RICO and CCE statutes provided for forfeiture of "any interest in . . . property . . . of any kind." 18 U.S.C., Section 1963(a); 21 U.S.C., Section 848(a)(2). Both the RICO and CCE statutes were specifically amended by Congress in 1984 to include provisions for the forfeiture of real property.

District Court Judge Strom stated that the amendments to the RICO and CCE statutes were designed to eliminate any ambiguities as to the forfeiture of real property. The Court noted: "Congress, however, did not amend 18 U.S.C., Section 1955 in the Comprehensive Crime Control Act, even though the case law is split as to whether real property is forfeitable under this statute." (Dist. Ct. Memorandum Opinion, Appendix 5).

The Court of Appeals Memorandum Opinion, reinforces this reasoning: "The fact that federal courts, when section 1955 was drafted, had never allowed the forfeiture of real property without express Congressional authorization to forfeit "real property" is relevant because it indicates that Congresspersons drafting the language may not have even considered the possibility

that any nonspecific forfeiture provision could be interpreted as reaching real property." (June 1, 1989, Appendix 19).

A. The Legislative History of 18 U.S.C. § 1955 and Related Statutes Support the Opinions of the District Court and the Eighth Circuit Panel.

In passing § 1955, Congress did not expressly, nor impliedly, state that real property was to be included in the type of property subject to forfeiture. The legislative history of this statute makes no reference to any purpose or intent to allow the government to seize real property. Had Congress intended to include real property in the forfeiture provision, it could have expressly done so at its legislative hearings or in the law itself.

The forfeiture statute references procedures used in the customs laws or for admiralty and maritime claims. The law of customs and admiralty deals, by its very nature, with personal property, not real property.

For instance, in 28 C.F.R., Part 9.6, the language states that if seized property can be more advantageously sold in another district, then "the property shall be moved to and sold in such other district." This obviously and logically relates to personal property only.

As stated in *United States v. Turkette*, 452 U.S. 576 (1981)." . . . , absurd results are to be avoided and any internal inconsistencies in the statute must be dealt with." The interpretation of Section 1955 by the Eighth Circuit, En Banc, leads not only to an absurd result, but to an arbitrary result as well.

In *United States Marshalls Service v. Means*, 741 F. 2d 1053 (1984), the Eighth Circuit was faced with a question of statutory interpretation. The Honorable John R. Gibson stated:

> Generally speaking, a legislative affirmative description implies denial of the non-described powers. (Citations omitted) Furthermore, where Congress uses particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress has acted intentionally and purposefully in their disparate inclusion or exclusion. (Citation omitted), at 1056.

The En Banc Opinion liberally interprets § 1955(d) to include real property, arguing for the inclusion of non-described powers in 1955(d).

RICO and CCE, enacted at the same time as 1955(d), utilizing the same language as 1955(d), were held by the Courts to include real property. But, these statutes were specifically amended to resolve the ambiguities regarding real property. RICO and CCE are criminal forfeitures and of an *in personam* nature while Section 1955 is a civil forfeiture which is an *in rem* action.

When read in its full and proper context, it is obvious that real property was never contemplated as being within the meaning of that term as used in § 1955(d). Furthermore, the target of the forfeiture provisions in the statute are the "instrumentalities" of illegal gambling and the "monies" obtained from the operation of an illegal gambling business. This is the type of property which is used to violate the statute. It is also the only type of property mentioned in the legislative hearings.

The Defendant's properties in this case are residential properties. These real properties are homes for families. They are homes which are in no way designed to be used as instrumentalities of gambling. Furthermore, none of these properties were obtained with funds obtained through the proceeds of gambling. No where in the entire legislative history of 18 U.S.C. 1955(d) does Congress

state an intention to allow the Government to seize residential properties.

We respectfully submit that the legislative history of 18 U.S.C., 1955(d), and related statutes, support the conclusion of the District Court that real property is not encompassed with the statute.

II. Case law is split regarding whether the forfeiture of real property is within the scope of 18 U.S.C., Section 1955(d).

As noted by the District Court, there are six reported decisions addressing the question of whether real property is forfeitable under Section 1955(d). The reported decisions addressing this issue are from the Second, Third, Fourth, Eighth and Eleventh Circuits.

Two of these decisions, *United States v. Premises and Real Property at 614 Portland Avenue*, 670 F.Supp. 475 (W.D., N.Y. 1987), aff'd, 846 F.2d 166 (2d Cir. 1988), *United States v. Various Denominations of Currency*, 628 F.Supp. 4 (S.D. W.V. 1984), support the recent decision in this case by the eighth Circuit, including real property in the statute.

The other three cases: *United States v. Building and Property Known As 123-125 East Twelfth Street, Erie, Pa.*, 527 F.Supp. 1167 (W.D. Pa. 1981); *DiGiacomo v. United States*, 346 F.Supp. 1009 (D. Del. 1072); and the latest federal court decision, *United States v. Premises Located At 207 W. Washington St.*, U. S. Dist. Ct., for the Northern District of Alabama, Northwestern Division, Civil Action No. 89-AR-5451-NW (Appendix 46), support Petitioners' position.

The first case addressing forfeiture of real property under Section 1955(d) was *DiGiacomo v. United States, supra.*

In holding that 1955(d) did not encompass real property, the *DiGiacomo* Court used a rule of reasonable, rather that strict construction, of the statutory language.

> That Court based its decision on four premises:
> (1) If Congress had intended to include real property, it could have easily said so, but it did not.
> (2) Forfeiture provisions are governed by procedure for seizure under the customs and admiralty procedure. Under customs and admiralty law, such property is always personal, not real.
> (3) The only instance where forfeitures of real property have ever been attempted and sanctioned, is under statutes *expressly* authorizing the forfeiture of real property. (emphasis added)
> (4) While articles of personal property are relatively easy to seize and forfeit under the custom laws, the problem of disposing of various interests in real property presents many problems, especially with regard to innocent lien holders.

In the next reported case, *United States v. Building and Property Known As 123-125 East Twelfth Street, Erie, Pa., supra,* the government seized and attempted forfeiture of a two story commercial building. The first floor of the building was leased to a restaurant operator; a gambling business operated out of the second floor of the building.

The Court in this case cited the *DiGiacomo* decision and held that Section 1955(d) did not encompass real property. The Court concluded that the *DiGiacomo* Court held that a "reasonable construction" of the statute compelled this conclusion.

This question was next addressed in *United States v. Various Denominations of Currency, supra,* in 1984. In this

case, the government sought the forfeiture of a tavern owned by a Defendant who *was convicted* of violating Section 1955.

The *Various Denominations* Court held that Section 1955(d) included real property, but affords protection from forfeiture to innocent third parties.

This Court unconvincingly states that the analysis in *DiGiacomo* and *Building and Property* was not persuasive.

In its analysis, the Court compared Section 1955(d) to 18 U.S.C., Section 1963 (RICO) and 21 U.S.C., 848 (CCE) and erroneously concluded that since the RICO and CCE provisions had been interpreted to include real property, then Section 1955(d) should be interpreted in a like fashion.

In its opinion, the *Various Denominations Court* noted that unlike RICO and CCE, 18 U.S.C. Section 1955 does not *require* the forfeiture of property used in gambling, but that property *may* be seized and forfeited.

This prompted the *Various Denominations* Court to add this important caveat:

> . . . it would appear appropriate to declare forfeiture where only a minor portion of the property was used for gambling or the forfeiture, taking into account its effect on the interests of third persons, would effect a disproportionate penalty or fail to effect the purposes of forfeiture.

Supra at 8.

The Second Circuit Court of Appeals affirmed the decision on appeal.

Petitioners respectfully submit that the *Various Denominations* decision is no longer sound case law inasmuch as the RICO and CCE provisions on which its analysis rests, were specifically amended in 1984 to

include real property. As noted by the District Court in its Memorandum Opinion (Appendix 5), these amendments were drafted for the very purpose of eliminating ambiguities in the original statute – ambiguities relating to whether "any property" included real property.

In the 1988 Second Circuit case, *United States v. Premises in Real Property at 614 Portland Ave., supra,* the government seized and sought to forfeit real property.

The complaint on which the seizure was based included an Affidavit of an F.B.I. agent. The Affidavit detailed occasions on which an F.B.I. agent or local police observed gambling activities at 614 Portland Avenue. The Affidavit also identified particular individuals and approximate amounts of money involved. (In the instant case, the Government seized Petitioners' property on the basis of Complaints alone, with no accompanying Affidavits.)

Concluding that real property was encompassed within Section 1955(d), this Court followed the same rationale as the *Various Denominations* Court. They compared Section 1955 to RICO and CCE, and held that since those provisions encompasses real property, Section 1955 should also encompass real property.

The Court examined the history of the forfeiture statutes acknowledging that the provisions relied on procedures of the customs or admiralty law, which deal, by their very nature, in personal property and not real property.

Claimants, in this case, argue, *inter alia,* that since the procedures for the forfeiture statutes deal strictly with personal property, then Congress intended the forfeiture provisions to deal only with real property.

The *614 Portland Ave.* Court said that this argument failed to take into account that even where Congress has chosen to include real property in forfeiture provisions, it still applies customs and admiralty law procedures.

The latest case interpreting Section 1955 is *United States v. Premises Located at 207 W. Washington St.*, Civil Action No. 89-AR-5451-NW, filed September 12, 1990, from the United States District Court for the Northern District of Alabama, Northwestern Division.

The Honorable William M. Acker, Jr., in his Memorandum Opinion, Appendix 45, stated that the Eleventh Circuit had not ruled on the question of whether or not 18 U.S.C., Section 1955 is a vehicle for forfeiture of real property. Judge Acker's Memorandum Opinion made reference to Petitioner's instant case:

> The only reason this court brought up *U.S. v. South Half of Lot 7 and 8, Block 14* during oral argument is that this court was tentatively persuaded by the logic of the Eighth Circuit panel majority, which now represents the Eighth Circuit minority. Not only does this court agree with the ultimate dissenters of the Eighth Circuit, but it agrees with the Eleventh Circuit in *U.S. v. $38,000*, 816 F.2d 1538, 1547 (11th Cir. 1987), which joins the Eighth Circuit dissenters in holding that forfeitures are not favored in the law and should be enforced only when within both the letter and spirit of the law.

(Appendix 52 and 53).

While Congress may mandate the use of customs and admiralty law procedures in cases where real property is subject to forfeiture, unless Congress expressly states that real property is subject to forfeiture, or amends the provision to include real property (as with RICO and CCE), inclusion of real property cannot simply be implied.

III.

Even if § 1955(d) encompassed real property within its meaning, the procedures used to seize that real property would be unconstitutional as applied to this case as it would violate the probable cause requirements of the Fourth, the due process of law requirement of the Fifth, and the cruel and unusual punishment provisions of the Eighth Amendments of the United States Constitution.

A. The Fourth Amendment Considerations.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. Amendment IV, U.S. Constitution.

"The Warrant Clause of the Fourth Amendment requires that, absent exceptional circumstances, a detached judicial officer – either a magistrate or a judge – must, prior to the issuance of a warrant for arrest or seizure, determine whether probable cause exists for the issuance of the warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1970); *Spinelli v. United States*, 393 U.S. 410, 415 (1968); *Warden v. Hayden*, 387 U.S. 294, 309-10 (1966); *Johnson v. United States*, 333 U.S. 10, 13-14 (1947). The amendment requires that a 'neutral and detached' judicial officer determine whether probable cause exists because the rights at issue are too important to be judged by officers 'engaged in the often competitve enterprise of ferreting out crime.' " *Johnson*, 333 U.S. at 14. (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 28 and 29).

"The principle behind the warrant requirement is that every citizen is entitled to the security of his person

and property – particularly his own home – unless and until an adequate justification for disturbing that security is shown. Thus, the Government must be able to demonstrate its interest in people, places or things before using its power to disturb them." (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 29.)

It also established that probable cause cannot "be made out of affidavits which are purely conclusionary, stating only the affiant's or an informer's belief that probable cause exists." *United States v. Ventresca*, 380 U.S. 102, 108 (1964). Instead, a "recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform this detached function and not merely serve as a rubber stamp for the police." *Id.* at 109. *See also, Hayden*, 387 U.S. at 309. No distinction is made under the Fourth Amendment between seizure to secure evidence, seizures to secure instrumentalities or seizures to secure homes pursuant to forfeiture proceedings. (Court of Appeals Memorandum Opinion, June 1, 1989, Appendix 29).

In this case, prior to the forfeiture and arrest of the real property in question, there was no probable cause determination by any judicial officer. The warrants allowing the seizures were issued by a deputy court clerk, based on complaints which merely restated the words of the statute in general cursory allegations. This constitutional deficiency was specifically cited by several of the appellees as grounds for dismissal in our motions to dismiss.

The petitioners in this case have a constitutional right to an ex parte probable cause determination by a detached judicial officer prior to the seizure of their real property seized pursuant to 18 U.S.C. 1955(d). No United States Supreme Court case holds otherwise.

This failure was clearly a constitutional violation putting seizures beyond those authorized by law. As the district court held below, it is "inconceivable" that the statute allows "the government to seize a person's home as in these cases." This holding on this issue is supported by other courts which have looked at this specific issue. See *United States v. Property at 4492 So. Livonia Rd.*, 667 F. Supp. 79, 84 (W.D.N.Y. 1987). (Requirements of due process not satisfied "if seizure of real property takes place pursuant to a warrant issued solely by a Clerk without benefit of a probable cause determination by a judicial officer."); *United States v. Life Ins. Co. of Virginia*, 647 F.Supp. 732, 742 (1986). (Fourth Amendment requires, at a minimum, that the United States Attorney secure an *in rem* warrant from a magistrate or district court judge who has made a probable cause determination before seizing real property.)

The issue of whether or not the Government can circumvent the "probable cause" requirements of the Fourth Amendment to seize a person's home is an issue that demands the attention of the United States Supreme Court. If prosecutors can avoid the constitutional requirements of the Fourth Amendment with respect to the seizure of real property they will have little or no reason ever to apply for a warrant. Upon the mere suggestion of criminal activity, they could commence forfeiture proceedings, seize the home and then invade the premises under the guise of an obligation to inventory the property therein and completely by-pass the constitution.

More importantly, the property involved herein involves the personal homes of the petitioners. Unlike other countries, our country has always held inviolate the right of a person to maintain the ownership of his home

in fee simple unless there exists so compelling an overriding concern of the highest magnitude to justify the seizure of that home.

This is no small issue, and is one that can be resolved only by the United States Supreme Court, and not by the United States Congress.

B. The Fifth Amendment Considerations.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or the property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added)

The petitioners argue herein that to allow the Government to seize their homes without any review by a neutral and detached magistrate prior to the seizure constitutes a deprivation of property "without due process of law."

The concept is not only supported by the plain language of the Fifth Amendment, but supported also by the judicially fashioned equitable principle that forfeitures are disfavored and should be enforced only when they are within both the letter and spirit of the law. In this case, the legislative history establishes that it would be

beyond the spirit of the law to enforce a forfeiture against real property under § 1955.

Additionally, the letter of the law fails to provide adequate mechanisms for the forfeiture of the petitioners' real property.

The petitioners' homes were seized in this case without any pre-seizure notice or adversary hearing afforded to them by the Government. In short, they were deprived of property without due process of law.

Admittedly, the Supreme Court had held that in certain limited circumstances constitutional due process might be avoided in forfeiture proceedings. *See Calero-Toledo*, 416 U.S. at 679. However, *Calero-Toledo* does not dispense with the need for a pre-seizure determination by a judicial officer when the property involved concerns real property – particularly someone's home.

Calero-Toledo concerned only whether there was a constitutional requirement of pre-seizure notice and adversary hearing prior to the seizure and forfeiture of a yacht used in violation of drug laws. 416 U.S. at 676-80. The Court held there that no such constitutional requirement existed because of a combination of three factors: (1) the seizure served significant Government purposes; (2) these purposes might be frustrated by pre-seizure notice and hearing because the property involved was "of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given"; and (3) the seizure was initiated by Government officials rather than interested private parties. *Id.* at 679.

Calero-Toledo, however, in no way negates the right to an ex-parte probable cause determination, or an adversarial hearing by a judicial officer prior to the seizure of

real property. This simple constitutional procedure could in no way frustrate the ultimate seizure of this real property. Such a simple procedure would not give "advance warning of confiscation" to anyone, and the property involved is not "of a sort" that could easily be removed, destroyed or concealed even with advance warning. Nor would these procedures cause any undue delay.

Calero-Toledo does not stand for the principle that real property, particularly a person's home, can be forfeited to the government without due process of law. *Calero-Toledo* stands for the principle that only in very rare cases involving moveable property, and not real property, can the Fourth and Fifth Amendments be ignored.

C. The Eighth Amendment Considerations.

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
>
> Amendment VIII, U.S. Constitution

In cases interpreting this amendment, the United States Supreme Court has held it covers more than physical punishment; it prohibits penalties that are grossly disproportionate to the offense. See *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) and *Hutto v. Finney*, 437 U.S. 676, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); rehearing denied 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83.

We submit that the government-urged interpretation of Section 1955(d) would result in a disproportionate penalty making it violative of the Eighth Amendment.

The loss of one's personal residence without any hearing, or showing of guilt, is clearly disproportionate. This disproportionality is heightened when the home was not used as an instrumentality of crime, or was not obtained with proceeds of criminal activity.

The first Court to hold that Section 1955(d) encompassed real property recognized the potential for this disproportionality problem. Judge Copenhower in *United States v. Various Denomination of Currency, supra,* held that Section 1955, unlike RICO and CCE, does not require the forfeiture of property, but permits the forfeiture of property using the language "any property . . . may be seized . . . "

Judge Copenhower then stated:

> Additionally, it would appear appropriate to decline forfeiture where only a minor portion of the property was used for gambling, or the forfeiture, taking into account its effect on the interests of third persons, would effect a disproportionate penalty or fail to effect the purposes of forfeiture.

Supra at 8.

Due to the harsh nature of forfeiture provisions, the Ninth Circuit Court of Appeals has held that, even where the statute provides no discretion, district courts must avoid unconstitutional results by fashioning orders that stay within constitutional boundaries. *United States v. Busher,* 817 F.2d 1409 (9th Cir. 1987).

In *Busher,* the Ninth Circuit remanded back to the District Court a forfeiture case where the Court did not take the constitutional proportionate considerations into account.

Factors to be considered in this decision, the Ninth Circuit stated, include the harshness for other offenses,

circumstances surrounding the criminal conduct, the harm caused, Defendant's culpability, dollar volume of loss, existence of threat, risk of physical harm, benefit reaped by the Defendant, and degree to which the property was infected by criminal conduct.

Petitioners respectfully submit that inclusion of real property within the meaning of 18 U.S.C., 1955(d) would result in violations of the probable cause requirement of the Fourth Amendment, the due process provision of the Fifth Amendment, and the disproportionality provisions of the Eighth Amendment.

IV.

Even if § 1955(d) encompassed real property within its meaning, the Complaints filed against the Defendant properties in this case, without Affidavits and without a showing of probable cause, are insufficient as a matter of constitutional law.

The Complaints filed by the Government in this case state merely that the owners of petitioners' property were engaged in the conducting, financing, managing, supervising, directing and owning of a gambling business, in violation of 18 U.S.C. § 1955 (See Appendix 74). The verification that was a part of the Complaint contained language that was purely conclusionary. It contained no particular facts outlining the circumstances and allegations which would be sufficient for a showing that probable cause existed for the forfeitures. Nor did it demonstrate therein a sufficient interest in the property prior to the issuance of the complaints to serve as a basis for the forfeiture of residential properties.

As previously stated, Congress has directed that in forfeiture cases, the Supplemental Rules for Certain Admiralty and Maritime Claims be followed.

Rule C, Actions *In Rem*, of the Supplemental Rules for Certain Admiralty and Maritime Claims provides:

> (2) Complaint. In actions *in rem*, the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. *In actions for enforcement of forfeitures for violation of any statute of the United States*, the complaint shall state the place of seizure and whether it was on land or navigable waters, and *shall contain such allegations as may be required by the statute pursuant to which the action is brought*. (emphasis added)

Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims states:

> In actions to which this rule is applicable, the complaint *shall state the circumstances* from which the claim arises *with such particularity that the Defendant or Claimant will be able, without moving for a more definite statement*, to commence an investigation of the facts and to frame responsive pleading. (emphasis added)

Petitioners respectfully submit that the complaints in this case fail to meet even the minimum statutory requirements.

The complaints simply state that the Defendant properties owners were engaged in a gambling operation violation of 18 U.S.C., Section 1955.

It has been held that Rule E(2)(a) requires a more particularized complaint than is necessary in civil actions generally because of the drastic remedy of the *in rem* forfeiture, *United States v. 39,000 in Canadian Currency*, 801 F.2d 1210 (10th Cir. 1986).

In that case, the Tenth Circuit held that a civil forfeiture complaint must allege specific facts *"sufficient to support an inference that the property is subject to forfeiture under the statute."* *Supra* at 1219.

Petitioners respectfully submit that the government's Complaint is insufficient to meet both statutory and constitutional requirements and does not support an inference that the property is subject to forfeiture. Therefore, even if § 1955(d) encompasses real property within its meaning, the Complaints filed against the Defendant properties should have been dismissed as being insufficient as a matter of law.

V.

Even if § 1955(d) encompassed real property, the forfeiture provisions of 18 U.S.C. § 1955, although *in rem* in nature, are criminal or quasi-criminal, not civil forfeitures, and as such, require a criminal conviction or some other procedure before they can be invoked.

Title 18 of the United States Code, Crimes and Criminal Procedure, defines and prohibits criminal activities.

Section 1955 of 18 U.S.C. prohibits, as well as defines, gambling offenses.

The pertinent punishment section is Section 1955(d) which reads:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years.

Section (d) of Section 1955 provides for forfeiture of any property used in violation of the section.

Nowhere, in any of provisions of Section 1955 is this forfeiture defined as being "civil" in nature.

Since this is an *in rem* action, brought against the thing, or property, the government mistakenly construes this action as civil.

In contrast to this, the forfeiture provisions of RICO and CCE, and other criminal statutes are *in personam*, against the person, actions. These criminal, *in personam*, forfeitures require a *predicate* criminal conviction before they can be invoked.

Petitioners respectfully submit that the use of this *in rem/in personam* procedural distinction is being used to circumvent the previously mentioned constitutional safeguards which afford protection against this type of action.

Furthermore, Section 1955(d) provides for forfeiture of " . . . any property used in violation of this section." The Defendant properties in this case are residential homes, held in fee simple absolute subject to certain mortgages and liens.

Petitioners submit that real property cannot be used as an "instrumentality" of a gambling offense, unless it is used as a wager or bet, or is obtained through, or with, traceable proceeds of illegal acts.

The real properties in this case can be nothing more than the site of a criminal offense. The government has made no allegation that these properties were obtained with, or through, the traceable proceeds of illegal acts. In fact, the government alleges nothing more than that these properties are owned by persons who were "engaged in the conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business."

The use of this mere allegation coupled with the *in rem* procedural aspects of this case would allow the forfeiture of a person's home, or any other real property without any showing of guilt of the crime and no procedural safeguards afforded to protect the interests of the owner, or third party, in the property. The procedures are constitutionally defective.

Finally, Rule C(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims supports this position. In discussing Ancillary Process, the Rule states that where property may come under the control of the Court, the Court may order that the interested person show cause as to why the property should not be delivered into the custody of the marshal or paid into the Court *to abide the judgment*.

Petitioners respectfully submit that even if Section 1955(d) forfeiture provisions include real property, then the provisions, although *in rem* in nature, are criminal forfeitures.

As such, no forfeiture can be accomplished unless, and until, there is a criminal conviction under the statute.

CONCLUSION

It is respectfully submitted that the Court of Appeals for the Eighth Circuit erred in holding that the term "any property" as used in Section 1955(d) encompasses real property. A reasonable and constitutional reading of the statute, the legislative history, case law, and the procedural process support the conclusion of the District Court and the June 1, 1989, Memorandum Panel Opinion of the Court of Appeals for the Eighth Circuit.

Furthermore, even if real property is encompassed within the meaning of Section 1955(d), it would be

unconstitutional as applied to this case because it would violate the probable cause requirement of the Fourth Amendment, the due process provisions of the Fifth Amendment, and the proportionality provisions of the Eighth Amendment of the United States Constitution.

Additionally, even if real property is encompassed within the meaning of § 1955(d), the Complaints filed against the Defendant properties in this case without Affidavits and with no showing of probable cause are insufficient as a matter of law.

Finally, even if real property is encompassed within the meaning of the section, the forfeiture provisions, although *in rem* in nature, are criminal or quasi-criminal and not civil forfeitures and, as such, require a criminal conviction or other procedure before they can be invoked.

For all of the aforementioned reasons, the decision of the Court of Appeals for the Eighth Circuit, rehearing en banc, should be reversed.

Respectfully submitted,

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Counsel of Record for Petitioners

UNITED STATES OF AMERICA, Plaintiff, v. LOT 8, BLOCK 5, WEARNE PARK, AN ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., et al., Defendant.	CV. 88-0-221 MEMORANDUM OPINION

This matter is before the Court on the following motions to dismiss:

CV. 88-0-187, Filing No. 5;
CV. 88-0-188, Filing No. 3;
CV. 88-0-189, Filing No. 11;
CV. 88-0-202, Filing No. 5;
CV. 88-0-213, Filing No. 9;
CV. 88-0-215, Filing No. 3;
CV. 88-0-216, Filing No. 5;
CV. 88-0-217, Filing Nos. 5 and 6;
CV. 88-0-219, Filing No. 3;
CV. 88-0-220, Filing No. 4;
CV. 88-0-221, Filing No. 4.

Jurisdiction of this Court is pursuant to 28 U.S.C. §§ 1345, 1355, 1356 and 1395.

The controversy in this matter concerns a forfeiture action pursuant to 18 U.S.C. § 1955. The government contends the property that is the subject of this action was used for the purpose of conducting, financing, managing, supervising, or owning all or part of an illegal gambling business in violation of 18 U.S.C. § 1955, and is

thus subject to forfeiture to the United States government.[1]

In all but two of the cases,[2] the defendants have filed motions to dismiss claiming that 18 U.S.C. § 1955(d) does not permit the forfeiture of real property and accordingly, there is no jurisdiction over the defendant property in this matter. In support of their arguments the defendants cite the cases of **DiGiacomo v. United States,** 346 F.Supp. 1009 (D.Del. 1972), and **United States v. Building and Property Known as 123-125 East Twelfth Street, Erie, Pennsylvania,** 527 F.Supp. 1167 (W.D.Pa. 1981), both of which hold that the words "any property" in § 1955(d) do not encompass real property and such property was not intended by Congress to be the subject of forfeiture action.[3]

The government cites the cases of **United States v. Premises and Real Property at 614 Portland Avenue,** 670 F.Supp. 475 (W.D.N.Y. 1987), **aff'd,** 846 F.2d 166 (2d Cir. 1988); and **United States v. Various Denominations of Currency,** 628 F.Supp. 4 (S.D.W.Va. 1984), to support its claim that real property may be seized and forfeited under the statute. These cases appear to be the only

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[1] While the pleadings in these cases do not specifically describe the nature of the properties involved, it appears from the complaint and claimants' responses that these properties generally represent the residences or family homes of the claimants.

[2] CV. 88-0-214 and CV. 88-0-218.

[3] 18 U.S.C. § 1955(d) states in relevant part that: "Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States."

reported decisions addressing the question of whether real property is forfeitable under § 1955(d).

Thus, this Court must decide whether real property may be the subject of forfeiture under § 1955. In interpreting the term "any property," the Court must first look at the statutory language. At the same time, the Court notes it has "some 'scope for adopting a restricted rather than a literal or usual meaning of [the statutory language] where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.' " **Trans Alaska Pipeline Rate Cases,** 436 U.S. 631, 643 (1978) (**quoting Commissioner v. Brown,** 380 U.S. 563, 571 (1965) (citations omitted)). Thus, absurd results are to be avoided and any internal inconsistencies in the statute must be dealt with. **United States v. Turkette,** 452 U.S. 576 (1981).

Section 1955 was enacted as part of the Organized Crime Control Act of 1970, Pub.L. 91-452. At that time, Congress passed a "number of new civil and criminal forfeiture statutes focused on combatting organized crime and drug trafficking." **Premises and Real Property,** 670 F.Supp. at 477. The Organized Crime Control Act also included provisions relating to Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961-68.

In addition to the Organized Crime Control Act, in 1970 Congress also enacted the Controlled Substances Act, Pub.L. 91-513, which contains provisions relating to continuing criminal enterprises (CCE) involving five or more persons. 21 U.S.C. § 848. When enacted, RICO and CCE both provided for the forfeiture of property.[4]

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[4] 18 U.S.C. § 1963(a) (RICO); 21 U.S.C. § 848 (a) (CCE). When Congress passed these statutes, they did not adopt any

(Continued on following page)

When enacted, the criminal forfeiture sections of the RICO and CCE statutes provided for the forfeiture of "any interest in . . . property . . . of any kind." 18 U.S.C. § 1963(a); 21 U.S.C. § 848(a)(2). These statutes were interpreted by the courts to include real property even though real property was not specifically mentioned in the statutes.[5] Nonetheless, these statutes were amended by Congress in 1984 to specifically include provisions for the forfeiture of real property. Both 18 U.S.C. § 1963(b) and 21 U.S.C. §§ 848 and 853(b) currently state that property subject to criminal forfeiture under this section includes – (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

The legislative history of these amendments reveal that they were enacted as a part of the Comprehensive Crime Control Act of 1983. Title III of that Act deals with

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(Continued from previous page)

statutes governing the procedures by which these forfeiture actions were to proceed. Instead, the statutes referred to the procedures used in the customs laws or certain supplemental rules for admiralty and maritime claims. The Court notes that the substantive law of customs and admiralty deal with personal, and not real, property.

[5] **United States v. Godoy,** 678 F.2d 84 (9th Cir. 1982), **cert. denied,** 464 U.S. 959 (1982); **United States v. Tunnell,** 667 F.2d 1182 (5th Cir. 1982); **United States v. Mannino,** 635 F.2d 110 (2d Cir. 1980); **United States v. Grammatikos,** 633 F.2d 1013 (2d Cir. 1980); **United States v. Smaldone,** 583 F.2d 1129 (10th Cir. 1978), **cert. denied,** 439 U.S. 10773 (1979); **United States v. Zang,** 645 F.2d 999 (Temporary Emergency Court of Appeals 1981), **cert. denied,** 454 U.S. 864 (1981).

forfeiture and was designed to "enhance the use of forfeiture . . . in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." 1984 U.S.Code Cong. & Adm. News, pp. 3182, 3374-3404, Pub.L. 98-473. In addition to amending the RICO and CCE criminal forfeiture provisions, the Comprehensive Crime Control Act amended 21 U.S.C. § 881, which provides for civil forfeiture of a variety of drug-related property to specifically state that real property is forfeitable under these statutes. The amendments to these statutes were for the purpose of eliminating the ambiguities in the original statutes and to explicitly provide for the forfeiture of real property. Congress, however, did not amend 18 U.S.C. § 1955 in the Comprehensive Crime Control Act, even though the case law is split as to whether real property is forfeitable under this statute.

Thus, when this Court is faced with the term "any property" in § 1955, a term which has been amended in related statutes to specifically include real property, it cannot conclude that the intent of Congress was to permit the forfeiture of real property under § 1955, and in particular, the family residences of those engaged in gambling activities, which would punish, in effect, those who had no connection with the activities giving rise to the claims of forfeiture.

This Court finds it inconceivable that the intent of § 1955 was to allow the government to seize a person's home as in these cases. This Court finds that civil forfeiture of a person's home is simply not one of the "new remedies" envisioned by Congress to destroy the economic profit motive of gambling activity. This Court finds

that the words "any property" in § 1955(d) do not encompass real property and such property was not intended by Congress to be the subject of forfeiture action. Accordingly, a separate order granting the defendants' motions to dismiss will be entered this date. In addition, while no motions to dismiss were filed in two cases (CV. 88-0-214 and CV. 88-0-218), the Court notes that the relevant issues were raised in the claimants' answers. In the interest of judicial economy, the order dismissing these actions will include those cases.

DATED this 1st day of August, 1988.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

UNITED STATES OF AMERICA, Plaintiff, v. LOT 8, BLOCK 5, WEARNE PARK, AN ADDITION TO OMAHA, DOUGLAS COUNTY, NEBRASKA, etc., et al., Defendant.	)	CV. 88-0-221 ORDER

This matter is before the Court in the above-captioned cases on the government's motion to alter or amend judgment and the government's motion to stay the proceedings pending determination of the motion to alter or amend judgment.

The government's motion to alter or amend requests that this Court alter and amend its memorandum opinion and order of August 1, 1988, which granted the motions to dismiss in these cases. In support of its motion, the government first argues that this Court erred in reviewing the legislative history of 18 U.S.C. § 1955, as the plain language of the statute is unambiguous. This Court does not find the government's argument persuasive as there is "no errorless test" for identifying or recognizing unambiguous language. **United States v. Turkette,** 452 U.S. 576, 580 (1981).

The government then argues that this Court's failure "to adopt and adhere to the most recent case law with respect to this issue" is clearly erroneous. The Court notes that the only reported decisions dealing with this question are from the Second, Third and Fourth Circuits. Two of these decisions support the government's position

in this matter[1] while the other two cases support the defendants' position.[2] None of these decisions are from the Eighth Circuit, and this Court is not compelled to follow the "most recent" case law in the absence of precedent from the Eighth Circuit. As such, the government's argument is without merit.

The government then argues that this Court's reliance on the fact that these cases involve, for the most part, residences or family homes in granting the motions to dismiss is erroneous. The government's argument is unpersuasive as the Court's ruling clearly states that "when this Court is faced with the term 'any property' in § 1955 . . . it cannot conclude that the intent of Congress was to permit the forfeiture of real property under § 1955, *and in particular* [residences or family homes]." Memorandum Opinion at p. 8 (emphasis added). Further, the memorandum opinion states that "this Court finds that the words 'any property' in § 1955(d) do not encompass real property and such property was not intended by Congress to be the subject of forfeiture action." **Id.** It is clear that this Court's ruling is not limited to residences and family homes but encompasses any and all real property. As such, the government's argument that this Court's

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[1] **United States v. Premises and Real Property at 614 Portland Avenue,** 670 F.Supp. 475 (W.D.N.Y. 1987), aff'd, 846 F.2d 166 (2d Cir. 1988); **United States v. Various Denominations of Currency,** 628 F.Supp. 4 (S.D.W.V. 1984).

[2] **United States v. Building and Property Known As 123-125 East Twelfth Street, Erie, Pa.,** 527 F.Supp. 1167 (W.D.Pa. 1981); **DiGiacomo v. United States,** 346 F.Supp. 1009 (D.Del. 1972).

order implies that "homes are in some way special" is without merit.

This Court restates that the term "any property" in 18 U.S.C. § 1955(d) does not encompass real property. The Court further notes that § 1955(d) permits the seizure of property, including money, "used in violation of the provisions of this section." Section 1955(b)(2) defines gambling as including, but not limited to, "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." The Court notes that the instrumentalities of illegal gambling and the monies obtained from the operation of an illegal gambling business are the focus of the forfeiture provision in the statute. This conclusion is further buttressed by the language of § 1955(d), which states: "All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage or the proceeds from such sale . . . shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section. . . . " No reference to real property is included in that language. The government's assertion that real property is forfeitable under § 1955(d) is once again rejected by this Court and accordingly,

IT IS ORDERED:

1) That the government's motion to alter or amend judgment is denied;

2) In view of the disposition of the motion to alter or amend judgment, the government's motion to stay the

proceedings pending determination of the motion to alter or amend judgment is denied.

DATED this 5th day of August, 1988.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2212

United States of America, Appellant, v. The South Half of Lot 7 and Lot 8, Block 14, Kountze's 3rd Addition to the City of Omaha, etc., et al, Appellees.	*	On Appeal from the United States District Court for the District of Nebraska.

Submitted: December 12, 1988

Filed: June 1, 1989

Before HEANEY AND FAGG, Circuit Judges, and HANSON,* Senior District Judge.

HANSON, Senior District Judge.

The government appeals the order of the District Court, the Honorable Lyle E. Strom presiding, dismissing 13 separate forfeiture actions involving real property brought by the government pursuant to 18 U.S.C. § 1955(d). The District Court held that real property was

* The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

not subject to forfeiture under section 1955(d) and that it was inconceivable that the government had authority under this law to seize real property as it had in these cases. We find that real property is excluded from the reach of section 1955(d) and that the procedure used to seize the real property in these cases was constitutionally deficient. Accordingly, we affirm the order of the District Court.

FACTS

In early March of 1988 the United States filed 13 complaints for forfeiture against certain real properties in Omaha, Nebraska, alleging that the properties, which included personal residences, were used in violation of 18 U.S.C. § 1955. All of the complaints were identical in format. Each contained only a general nonspecific allegation, predicated on information and belief, of how the property was being used in violation of section 1955. Specifically, paragraph six of each complaint alleged simply that the property involved "with its buildings and appurtenances was used for the purpose of conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business as listed in paragraph 5 above." Paragraph five added little more, merely stating that the owner of the property "was engaged in the conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955." These two conclusory sentences, devoid of any specifics, provided the only rationale for the seizures.

On the basis of these cursory allegations a deputy clerk for the United States District Court for the District of Nebraska issued a Warrant for Arrest of Property in each case directing the United States Marshal to seize the named properties. The record indicates that the deputy clerk issued the warrants without any type of probable cause determination by a judicial officer or any type of preseizure hearing. The marshal complied with these warrants and seized the named properties.

Five months after the seizures the District Court entered its order dismissing the complaints and releasing the properties. There is no indication in the record of whether the inhabitants of the personal residences involved had been forced from their homes during this five month period. Judge Strom based the dismissal on his finding that "the words 'any property' in section 1955 do not encompass real property and such property was not intended by Congress to be the subject of forfeiture action." Judge Strom also held that it was "inconceivable that the intent of Section 1955 was to allow the government to seize a person's home as in these cases."

The statute relied upon by the government as authorization for the seizures states:

> Prohibition of illegal gambling businesses
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section –
>
> (1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operations for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. * * *

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed

> with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General. * * *

18 U.S.C. § 1955 (1982).

The government argues that the District Court should be reversed on the grounds that 1955(d) authorizes the forfeiture of real property by the phrase, "[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." Appellees counter that Congress intended this language only to reach personal property. Appellees also assert that section 1955(d) is a criminal, rather than civil, forfeiture provision which accords them rights they were not given. No criminal charges or indictments had been brought under 1955 against any of the owners of the seized real property at the time this case was submitted.

DISCUSSION

The question of whether the forfeiture provisions of 18 U.S.C. § 1955 reach real property is an issue of first impression in this circuit. The statute was passed as part of The Organized Crime Control Act of 1970, Pub. L. No. 91-452, but has previously only been used in this circuit as authority for the seizure of the equipment and money used in illegal gambling enterprises. Attempts in other circuits to use the law to reach real property have had limited success. *See United States v. Premises and Real Property 614 Portland*, 846 F.2d 166, 167 (2nd Cir. 1988), *aff'g* 670 F. Supp. 475 (W.D.N.Y. 1987) (real property forfeitable); *United States v. Bonanno Organized Crime Family*,

683 F. Supp. 1411, 1460 (E.D.N.Y. 1988) (real property forfeitable); *United States v. Various Denominations of Currency*, 628 F. Supp. 4, 8 (S.D.W.Va. 1984) (real property forfeitable); *United States v. Bldg. & Prop. Known as 123, etc.*, 527 F. Supp. 1167, 1168 (W.D.Pa. 1981) (real property not forfeitable); *DiGiacoma v. United States*, 346 F. Supp. 1009, 1012 (D.Del. 1972) (real property not forfeitable).

We begin our analysis of whether the forfeiture provisions of section 1955(d) reach real property by recognizing that "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One Ford Coach*, 307 U.S. 219, 226 (1938). Thus, courts faced with a novel or expansive reading of a forfeiture provision must review both the language of the statute and its legislative history to insure that such an expansion fits within both the "letter and spirit of the law." We look first to the letter of section 1955.

1. The Plain Meaning Argument

The main argument offered by the government for the proposition that real property is forfeitable under this law is simple, but powerful. The statute, by its terms, states that "[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." Thus, the government argues, as the general meaning of the phrase "any property" would include real property, the statute should be read as reaching real property.

Appellees contend that the plain meaning argument fails on several counts. First, they argue that it fails to

acknowledge that the statute adopts the provisions of the customs laws, which relate only to personal property, to provide the mechanics for any forfeitures. Appellees also assert that because Congress routinely specifies that a forfeiture provision reaches real property when it intends such an outcome, the lack of such specificity in this statute is evidence that it did not intend the law to reach real property. Finally, appellees argue that the decision of Congress not to amend section 1955 to specifically include real property when it made such amendments to related laws is evidence that the provision is not intended to reach real property. We will examine each of these arguments in the order they are presented above.

The Incorporation of the Customs Laws Provisions

We find that appellees' argument concerning section 1955's incorporation of the customs laws' forfeiture mechanisms does have some merit. By their nature, the customs procedures adopted by the statute involve personal and not real property. *See, Bonanno,* 683 F. Supp. at 1459; *DiGiacomo,* 346 F. Supp. at 1011. They are neither structured nor well tailored for the forfeiture of real property. Consequently, it would make little sense for Congress to incorporate these provisions unless it expected that the seizures under the provisions would be of personal property. However, it is also true that the forfeiture provisions of the customs laws have been used by Congress to provide the forfeiture framework in some statutes which do specifically allow the forfeiture of real property, although the provisions were supplemented by

additional provisions which better adapted the provisions to real property. *See* 21 U.S.C. §§ 853 & 881 (Supp. IV 1986); 18 U.S.C. § 1963 (b) & (h) (Supp. IV 1986).

We resolve the conflict between these two points by finding that the adoption of the provisions relating only to personal property without any supplemental provisions relating to real property does indicate, at a minimum, that Congress expected the majority of forfeitures under the statute to be against personal property. We find that it also clearly establishes a real question as to whether Congress intended real property to ever be forfeitable under the statute. However, we also find that the incorporation of the customs laws provisions, by itself, is insufficient evidence on which to base a holding that real property is not forfeitable under the statute.

Other Federal Statutes

The comparison between section 1955 and other federal statutes which allow the forfeiture of real property also provides evidence that Congress may not have intended the phrase "any property" to include "real property". This Court is aware of only two other statutory provisions under which federal courts have sanctioned the forfeiture of real property without the statute specifically referring to real property. The two provisions were the original versions of 18 U.S.C. § 1963(a) (1970), a provision related to Racketeer Influenced and Corrupt Organizations (RICO), and 21 U.S.C. § 848(a) (1970), a provision related to Continuing Criminal Enterprises (CCE). Both of these provisions were amended in 1984 to specifically refer to real property by the Comprehensive

Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. In every other instance the Court is aware of, the forfeiture of real property has not been allowed without specific Congressional authorization. The court decisions allowing real property forfeiture under these two statutes all occurred after the enactment of section 1955.

The fact that federal courts, when section 1955 was drafted, had never allowed the forfeiture of real property without express Congressional authorization to forfeit "real property" is relevant because it indicates that Congresspersons drafting the language may not have even considered the possibility that any nonspecific forfeiture provision could be interpreted as reaching real property. Thus, Congress may have used the phrase "any property" in section 1955 without any conception that the phrase would or could be used to try to forfeit real property. Obviously the mere possibility that Congress may have engaged in such careless drafting based on prior court interpretations of forfeiture provisions does not by itself warrant a decision to narrowly interpret the language at issue. However, it is yet another factor which compels us to closely examine the legislative history of the provision for any evidence of its meaning, and which counsels against basing our statutory interpretation on the face of the statute alone.

Appellant argues that the failure to specifically refer to real property is irrelevant in light of the court decisions allowing the forfeiture of real property under the original RICO and CCE forfeiture provisions. We disagree for two reasons. First, the language in those two statutes was arguably more inclusive than that at issue here. The two provisions provided that a person convicted under

the statutes "shall forfeit to the United States * * * any interest in * * * property or contractual rights of any kind * * * ." 21 U.S.C. § 848 (1970); 18 U.S.C. § 1963 (1970). Secondly, the courts reviewing these statutes found nothing in their legislative history meriting a narrow interpretation, a situation which further analysis will show is not present here. *See United States v. Godoy*, 678 F.2d 84, 86-87 (9th Cir. 1982) (legislative history of RICO established intent by Congress for RICO forfeiture provision to reach commercial real estate).

The 1984 Amendments to RICO and CCE

Appellees' arguments concerning Congressional action in 1984 to amend the forfeiture provisions of RICO and CCE to specifically include real property are not convincing to this court. Appellees argue, and the district court largely agreed, that Congress' failure to similarly amend section 1955 when it amended these related statutes is evidence that Congress did not want section 1955 to reach real property. The forfeiture provisions of section 1955, RICO and CCE were all initially enacted in 1970.

The thrust of our inquiry must be what Congressional intent was in 1970 when it passed the statute at issue, not what it was in 1984 when it amended related bills. The "views of the subsequent congress form a hazardous basis for inferring the intent of an earlier one." *Russello v. United States*, 464 U.S. 16, 26 (1983) (quoting *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150, 165 n. 27 (1960)). Thus, we disagree with the district court's discussion on this issue.

The Legislative History of Section 1955

Our analysis of the preceding arguments establishes that by themselves they are insufficient justification to warrant a construction of the phrase "any property" which excludes real property per se. However, this analysis also raises sufficient questions about the intended meaning of the phrase in this statute to merit a searching examination of the legislative history of this provision to determine whether the expansion in use sought by the government is justified. Therefore, we turn from the letter of section 1955, to its spirit.

Section 1955 traces its history back to the "Illegal Gambling Business Control Act of 1969" introduced on April 29, 1969 as Senate Bill 2022, 91st Congress., 1st Sess. This bill was equivalent in most respects to its eventual offspring, 18 U.S.C. § 1955, with one major exception – S. 2022 contained no forfeiture provisions. S. 2022 was one of a number of bills relating to organized crime activities and related areas of criminal laws and procedures before the Committee on the Judiciary of the United States Senate in 1969. The main bill under consideration by the committee was S. 30. *See, Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) [hereinafter Hearings].

The hearings on S. 2022, conducted on June 3rd and 4th, 1969, indicate that the bill was drafted by the United States Department of Justice. During these hearings Senator John McClellan, Chairman of the Subcommittee on

Criminal Laws and Procedures of the Committee on the Judiciary, brought the lack of any forfeiture provision in the statute to the attention of Mr. Will Wilson. Wilson, the Assistant Attorney General, Criminal Division, was representing the Justice Department at the hearing.

The relevant dialogue was as follows:

> Senator McClellan: I take it that you hope this legislation dealing with gambling will strike at the economic basis of organized crime. Now, would it be helpful to add to S. 2022 a forfeiture provision that would cover the equipment, adding machines, and money used in operating the illegal business establishment?
>
> Mr. Wilson: I think it would, yes.
>
> Senator McClellan: Give us some thoughts on this.
>
> Mr. Wilson: Well, we will do that and submit some language on that.

Hearings at 397 (emphasis added).

Wilson followed through on this commitment by sending a letter to the committee on July 18, 1969 with proposed wording for the forfeiture provision. The letter, which the committee made a part of the record of the hearings, stated:

> During my appearance before the Subcommittee on June 3rd, and during my discussion of S. 2022, which would make it unlawful to participate in an illegal gambling business, I agreed at your suggestion to draft a forfeiture provision which would cover the equipment or money used in the operation of such an illegal gambling business. I am, therefore, pleased to submit the following provision as an amendment to

Title II of S. 2022 which it is believed will accomplish the objective sought:

"(e) It shall be unlawful to have or possess any property including money, intended for use in the violation of this Section or which has been so used, and no property rights shall exist in any such property. Such property shall be seized and forfeited to the United States. A search warrant may issue as provided in chapter 205 of Title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property."

"All provisions of law relating to the seizure, summary and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures of this section, insofar as applicable and not inconsistent with the provisions hereof; Provided, that such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures or property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General."

Please advise me if I can be of further assistance to the Subcommittee in connection with these matters.

Hearings at 411-412 (emphasis added).

On December 18, 1969, the Committee on the Judiciary reported an amended S. 30 out of committee with a favorable recommendation. The bill, now labeled the Organized Crime Control Act of 1969, was in the form of a substitute which incorporated the provisions of many of the separate bills which had been before the committee, including the organized gambling provisions of S. 2022. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 1 (1969). The incorporated version of S. 2022 now including the same basic forfeiture provision recommended by the Justice Department, although the wording had been slightly rearranged to limit its application to "[a]ny property, including money, used in violation of the provisions of this section", thus eliminating property merely intended for use. *See id.* at 17. The bill specified that the forfeiture provision was to be codified as 18 U.S.C. § 1955(d). The report accompanying this bill included a copy of the letter cited above stating that the purpose of the forfeiture provision was to cover "equipment or money" used in the gambling operation. *Id.* at 131.

Senate Bill 30 did not pass during the 1969 session of Congress but was reintroduced the following year as The Crime Control Act of 1970 with the identical forfeiture provision related to organized gambling. The bill was enacted on October 15, 1970, and the forfeiture provision at issue became law at 18 U.S.C. § 1955(d).

The references cited above are the only references in the entire legislative history which indicate the intended scope of section 1955's forfeiture provision and of the intended meaning of the phrase "any property, including money". There is no indication that Congress ever considered that the language would allow the seizure of

properties beyond those specified by the Justice Department. Absolutely no mention is made of the possibility that the language could or would be used to seize real property.

We find that this legislative history, when viewed in light of the ambiguities previously pointed out in the discussion of the text of the statute, establishes that Congress never intended the statute to be used to seize real property. Instead, it is clear to this court that the purpose of the provision was to be that represented by the Justice Department, a means of seizing the "equipment or money used in the operation of" an illegal gambling business prohibited under section 1955.

The government contends we should construe section 1955 to include real property regardless of the legislative history, thereby ignoring its representation to Congress at the time the bill was drafted that the provision would only "cover the equipment or money" used in gambling. This is unconvincing for several reasons. As we noted at the beginning of our analysis, forfeitures are disfavored and should be enforced only when within both the letter and spirit of the law. In this case the legislative history establishes that it would be beyond the spirit of the law to enforce a forfeiture against real property under section 1955. Additionally, the letter of the law fails to provide completely adequate mechanisms for the forfeiture of real property. Accordingly, we affirm the order of the district court holding that real property is not forfeitable under section 1955(d). We note that all courts which have come to a contrary conclusion failed to consider the legislative history cited above.

2. The Failure to Establish Probable Cause

Alternatively, our examination of the record also establishes that even if our interpretation of section 1955 is in error, the forfeitures at issue here would have to be dismissed because the procedures employed by the government were constitutionally deficient. The deficiency was the failure of the government to obtain a determination from a judicial officer that probable cause existed to seize the properties prior to the seizures. Our examination of this issue grows out of appellees' assertion that the forfeiture provision at issue is criminal, not civil, and that they were not afforded the constitutional rights such a classification requires.

The only authority we find in support of the proposition that section 1955(d) is a criminal rather than civil forfeiture provision is the concurring opinion of Judge Merritt in *United States v. U.S. Currency*, 626 F.2d 11 (6th Cir. 1980), *cert. denied*, 449 U.S. 993 (1980). Judge Merritt cites as authority for this conclusion: the fact that the forfeiture provision appears within the criminal code; and recent Supreme Court caselaw establishing that forfeiture " 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal for Fifth Amendment purposes.' " *Id.* at 18 (Merritt, J., concurring) (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1970)). The only reference in the bill or legislative history dealing with the classification of the provision states that "property used in violation of the provision may be seized and civilly forfeited to the United States." H.R.

Rep. No. 1549, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4009.

We find that the provision is technically a civil forfeiture provision. Courts have routinely treated the measure as such and the legislative history indicates that this treatment is correct. We believe Judge Merritt misreads recent Supreme Court case law dealing with forfeitures of the type at issue here. Our reading of these cases indicates that the criminal nature of such provisions does not convert them from civil to criminal, but instead merely mandates that individuals whose property is being taken pursuant to such provisions are entitled to certain constitutional protections. However, although we disagree with the specific ruling of Judge Merritt, we find that the caselaw he discusses does provide some constitutional protections to appellees in this case which they were not afforded.

In *Plymouth Sedan v. Pennsylvania* the Supreme Court held via an 8-1-0 vote that Fourth Amendment protections were available to a party whose property was being seized pursuant to a civil forfeiture provision which was quasi-criminal in character. 380 U.S. 693, 700-01 (1964). The Court defined forfeiture proceedings as being "quasi-criminal" when their object "is to penalize for the commission of an offense against the law." *Id.* at 700. *See also Boyd v. United States*, 116 U.S. 616, 634 (1985). Section 1955(d) is clearly such a quasi-criminal provision. *See United States v. Life Ins. Co. of Virginia*, 647 F. Supp. 732, 741 (W.D.N.C. 1986). Accordingly, Fourth Amendment prohibitions apply to forfeiture proceedings under this law.

The Fourth Amendment to the United States Constitution guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment guarantee [sic] that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law" also provides protection for property owners whose property is forfeited under quasi-criminal forfeiture statutes. *See generally, Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1973) (due process rights not violated by seizure of movable vessel without prior notice and hearing because forfeiture proceedings against movable vessel present extraordinary situation). Implicit in the analysis engaged in by the *Calero-Toledo* Court is the fact that, at the very minimum, the Constitution requires that forfeiture proceedings accommodate property owner's due process rights unless "legitimate purposes" are "served" by the failure to provide such accommodation. *Id.*, 416 U.S. at 679-80 & 689-90.

The Warrant clause of the Fourth Amendment requires that, absent exceptional circumstances, a detached judicial officer – either a magistrate or judge – must, prior to the issuance of a warrant for arrest or seizure, determine whether probable cause exists for the issuance of the warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1970); *Spinelli v. United States*, 393 U.S. 410, 415 (1968); *Warden v. Hayden*, 387 U.S. 294, 309-10 (1966); *Johnson v. United States*, 333 U.S. 10, 13-14 (1947). The

amendment requires that a "neutral and detached" judicial officer determine whether probable cause exists because the rights at issue are too important to be judged by officers "engaged in the often competitive enterprise of ferreting out crime". *Johnson*, 333 U.S. at 14.

The principle behind the warrant requirement is that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. Thus, the government must be able to demonstrate its interest in people, places or things before using its power to disturb them.

It is also established that probable cause cannot "be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists." *United States v. Ventresca*, 380 U.S. 102, 108 (1964). Instead, "[r]ecital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not merely serve as a rubber stamp for the police." *Id.* at 109. *See also Hayden*, 387 U.S. at 309. No distinction is made under the Fourth Amendment between seizures to secure evidence and seizures to secure instrumentalities. *Hayden*, 387 U.S. at 310.

In this case there was no probable cause determination by a judicial officer. The warrants allowing the seizure of the property were issued by a deputy clerk based on complaints which merely restated the words of the statute in general cursory allegations – a fact cited by several of the appellees in their motions to dismiss as

grounds for dismissal. This failure was clearly a constitutional violation putting the seizures beyond those authorized by the law. As the district court recognized, it is "inconceivable" that the statute allows "the government to seize a person's home as in these cases." Our holding on this issue is supported by other courts which have looked at this specific issue. *See United States v. Property at 4492 So. Livonia Rd.*, 667 F. Supp. 79, 84 (W.D.N.Y. 1987) (requirements of due process not satisfied "if seizure of real property takes place pursuant to a warrant issued solely by a clerk without the benefit of a probable cause determination by a judicial officer"); *United States v. Life Ins. Co. of Virginia*, 647 F. Supp. 732, 742 (1986) (Fourth Amendment requires, at a minimum, that United States Attorney secure an in rem warrant from a magistrate or district court judge who has made a probable cause determination before seizing real property).

We are cognizant, in making this holding, that the Supreme Court has held that in limited circumstances constitutional rights may be accommodated in forfeiture proceedings. *See Calero-Toledo*, 416 U.S. at 679. However, the argument that the *Calero-Toledo* holding forecloses the need for a probable cause determination by a detached judicial officer in this case miserably misreads the holding and rationale in that case.

The issue in *Calero-Toledo* was whether there was a constitutional requirement of preseizure notice and adversary hearing prior to the seizure and forfeiture by Puerto Rican authorities of a yacht being used in violation of drug laws. 416 U.S. at 676-80. The Court based its findings that no such requirement existed on a combina-

tion of three factors: (1) the seizure served significant governmental purposes; (2) these purposes might be frustrated by preseizure notice and hearing because the property involved was "of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given"; and (3) the seizure was initiated by Commonwealth officials rather than self-interested private parties. *Id.* at 679. The third factor was important to the Court, in part, because "the Fourth Amendment * * * guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause." *Id.* at 679-80 n.14 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 94 N.30 (1971)).

This analysis in no way negates the right to an ex parte probable cause determination by a detached judicial officer prior to the seizure of real property pursuant to section 1953 because the interests served by such seizures are not frustrated by adherence to this constitutional principle. Such a procedure does not give "advance warning of confiscation" to anyone and the property involved is not "of a sort" that could easily be removed, destroyed or concealed even with advance warning. Nor does it unduly delay seizure.

One cannot conscientiously read the *Calero-Toledo* opinion without concluding that legitimate purposes must be served by any accommodation of due process rights in forfeiture proceedings. Yet, no such purpose exists in this case. The interests served by the forfeiture provision would in no way be frustrated by such a requirement. Indeed, the only result we can envision from compliance with this basic constitutional tenet is the

increased possibility that government officials will not seize property in which they have no legitimate interest – the very purpose of the warrant clause.

Additionally, the involvement of the government in this forfeiture lacks the relevance which the Court gave it in *Calero-Toledo* because the government's actions in this case lack the very safeguards cited by the Court as the reasons warranting deference. The Court justified its deference to government forfeiture actions in *Calero-Toledo* on the basis of the Fourth Amendment's requirement that the government establish probable cause prior to any seizure. *Id.* at 679-80 n. 14. It would be a strange anomaly to now interpret that decision as support for the proposition that the government does not need to establish probable cause prior to seizures under forfeiture provisions because we give deference to forfeiture actions brought by the government.

Finally, the need for adherence to the constitutional requirement of having a probable cause determination by a judicial officer is clearly established by the facts in this case. The failure to honor these rights allowed a five month seizure of citizens' homes and other real property based upon allegations devoid of specifics and on the basis of a statute which does not authorize the seizure or forfeiture of real property. Sanctioning such governmental activity would make a nullity and mockery of the Fourth and Fifth Amendment guarantees at issue here. This we refuse to do.

Our holding on this issue is limited to the specific fact situation presented to this court and offered only as

an alternative ground supporting the district court's dismissal of the forfeiture complaints. We make no determination of whether exigent circumstances could ever exist in other cases which would allow the seizure of real property without a preseizure probable cause determination by a judicial officer, although we are unable to imagine what such circumstances could be. Thus, we do not reach the question of whether we disagree with the holding in *United States v. A Single Family Residence* that such a forfeiture under drug laws which specifically provide for no probable cause determination is constitutional. 803 F.2d 625 (11th Cir. 1986). We do note however, that we disagree with that court's conclusion that a footnote in *United States v. $8,850 in United States Currency,* 461 U.S. 555 (1982), establishes that no judicial determination of justification is ever constitutionally required prior to the governmental seizure of items for forfeiture. *A Single Family Residence,* 803 F.2d at 632. A complete reading of the footnote in *$8,850 in United States Currency,* which by the terms of the opinion is dictum, indicates that its focus is limited to the recognition that a forfeiture proceeding may, depending on the circumstances, constitute the type of "extraordinary situation" in which a seizure can legally occur without preseizure notice and adversary hearing. 461 U.S. at 562 n.12. We also take no position with regards to the First Circuit's holding that prior to seizing real property for forfeiture the government must, in addition to obtaining a probable cause determination from a judicial officer, afford the property owners a preseizure adversary hearing unless it can also demonstrate to the officer that preseizure notice would likely render the property unavailable for forfeiture and

that less restrictive means to protect the legitimate governmental interest in the property do not exist. *Application of Kingsley*, 802 F.2d 571, 580, 583 (1st Cir. 1986) (Coffin, J., concurring) (Torruella, J., dissenting).

The judgment of the District Court dismissing the complaints is affirmed.

FAGG, Circuit Judge, dissenting.

I believe Congress' statement in section 1955(d) that "[a]ny property * * * used in [an illegal gambling business] may be seized and forfeited to the United States" plainly permits the government to forfeit real property. 18 U.S.C. § 1955(b) (1982). Thus, following the Second Circuit's lead in *United States v. The Premises & Real Property at 614 Portland Avenue*, 846 F.2d 166, 167 (2d Cir. 1988) (per curiam), *aff'g* 670 F. Supp. 475 (W.D.N.Y. 1987), I would reverse the district court's order dismissing the government's forfeiture actions and remand for further proceedings on the government's complaints for forfeiture.

Settled rules of statutory construction control the issue before the court. Our task is to carry out congressional intent. *United States v. James*, 478 U.S. 597, 612 (1986); *United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987). To that end, if Congress has not defined a statutory term, we must assume Congress gave well-established words their ordinary meaning. *See James*, 478 U.S. at 604; *Jones*, 811 F.2d at 447. In this instance, the ordinary meaning of the word "property" includes both real and personal property. *See* Black's Law Dictionary 1095 (5th ed. 1979); Webster's Third New International Dictionary 1818 (1981). Furthermore, Congress' use of the word "any" to

describe property "undercuts a narrow[er] construction." *James*, 478 U.S. at 605. Finally, we may not ignore a statute's plain meaning unless the legislative history unquestionably shows a clear statement of contrary intent. *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *James*, 478 U.S. at 606.

The court initially takes up a laundry list of collateral matters, *ante* at 5-9, that it admits is "insufficient justification to warrant a construction of the phrase 'any property' [that] excludes real property," *id.* at 9. Regardless of this admission and section 1955(d)'s plain language, the court nevertheless concludes the "legislative history, when viewed in light of [those matters] * * * establishes that Congress never intended the statute to be used to seize real property," *id.* at 12. *But see United States v. The Premises & Real Property at 614 Portland Ave.*, 670 F. Supp. 475, 477-78 (W.D.N.Y. 1987), *aff'd*, 846 F.2d 166, 167 (2d Cir. 1988). We are not permitted, however, to look beyond a statute's plain terms and delve into its legislative history in order to generate an ambiguity that is not present in the statute in the first place. *See United States v. Harvey*, 814 F.2d 905, 916 (4th Cir. 1987). The court's methodology simply turns the process of statutory construction on its head and sidesteps an otherwise inescapable result.

In any event, I do not believe the legislative history of section 1955 supports the court's position. Although the court acknowledges the relevant history is sparse, *see ante* at 12, it nevertheless concludes that a single exchange between one senator and an assistant attorney general dictates the result it reaches. *See id.* at 9-11. I am not convinced.

After appearing before the subcommittee considering the bill, the assistant attorney general responded to a senator's request for proposed statutory language that would permit forfeiture of several items of personal property. *See id.* In doing so, the suggested language he ultimately supplied – "any property" – was significantly broader and in no way excluded real property. *See id.* at 10. The full committee adopted this language and, five months later, forwarded the bill for consideration. *See id.* at 10-11. Ten months after that, Congress enacted the forfeiture provision, leaving the "any property" language intact. *See id.* at 10. The legislative history contains no indication that either the committee or Congress gave this language anything other than its plain, ordinary meaning. As the Supreme Court has aptly observed, " '[t]he plain words and meaning of a statute cannot be overcome by a legislative history [that] * * * may furnish dubious bases for inference in every direction.' " *Ex Parte Collett*, 337 U.S. 55, 61 (1949) (quoted citation omitted).

In sum, I do not believe this unrevealing legislative history justifies departing from section 1955(d)'s ordinary meaning. *See James*, 478 U.S. at 606. Even if the isolated dialogue relied on by the court "raises * * * questions," *ante* at 9, the answers to those questions are inconclusive at best, *see Burlington N.R.R.*, 481 U.S. at 461. When that is the case, we carry out Congress' purpose by adhering to "the plain language of the statute itself." *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1056 (8th Cir. 1984) (en banc). Thus, in my view, the words "any property" in section 1955(d) permit the government to forfeit real property under the provisions of that statute.

Finally, the alternate holding, *see ante* at 13-19, adds nothing to the court's decision in this case. It gratuitously embraces a fourth amendment theory that was not raised in the parties' motions to dismiss or considered by the district court. Nor do the appellees specifically claim in their brief on appeal that a judicial probable cause determination was required before the forfeitures could proceed. Consequently, the alternate holding, which addresses an important constitutional application, will take the government by complete surprise, *see Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Indeed, the decision that the district court lacked jurisdiction over the real property sought to be forfeited under section 1955(d) brings decision-making to an end, and this court has no authority to issue an advisory opinion in the guise of an alternate holding. *See United States v. Taylor*, 544 F.2d 347, 349 (8th Cir. 1976).

Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2212NE

United State of America, Appellant, v. The South Half of Lot 7 and Lot 8, Block 14, Kountze's 3rd Addition to the City of Omaha, etc., et al., Appellees.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: October 10, 1989

Filed: August 3, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, En Banc.

FAGG, Circuit Judge.

Despite Congress's statement in 18 U.S.C. § 1955(d) (1988) that "[a]ny property, including money, used in [an illegal gambling business] may be seized and forfeited to the United States," the district court held "the words 'any property' . . . do not encompass real property" and dismissed the forfeiture actions brought by the government

against thirteen parcels of real estate allegedly connected with illegal gambling operations. Because the district court's interpretation finds no support in the plain meaning of the words "any property," we reverse and remand for further proceedings on the government's complaints for forfeiture.

The task of resolving the dispute over the scope of section 1955(d)'s forfeiture provision begins with the language of the statute itself. *United States v. Ron Pair Enters.*, 109 S. Ct. 1026, 1030 (1989). When used without qualification, the word "property" includes both real and personal property within its sweep. *Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66, 68 (1933); *Black's Law Dictionary* 1095 (5th ed. 1979); *Webster's Third New International Dictionary* 1818 (1981). Indeed, Congress's use of the word "any" to describe property "undercuts a narrow[er] construction." *United States v. James*, 478 U.S. 597, 605 (1986). The language of the forfeiture provision is plain and clear: real property used in illegal gambling operations may be seized and forfeited. The Second Circuit shares our view. *United States v. The Premises & Real Property at 614 Portland Ave.*, 846 F.2d 166, 167 (2d Cir. 1988) (per curiam), *aff'g* 670 F. Supp. 475, 478 (W.D.N.Y. 1987).

Although we believe the plain meaning of the forfeiture provision settles the question before us, we also look to the legislative history to see whether there is a " 'clearly expressed legislative intention to the contrary.' " *James*, 478 U.S. at 606 (quoted citation omitted). In doing so, we must keep in mind there is " 'no more persuasive evidence of the purpose of a statute than the words by which [Congress] undertook to give expression to its wishes.' " *Griffin v. Oceanic Contractors, Inc.*, 458 U.S.

564, 571 (1982) (quoted citation omitted). "The mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute." *In re Erickson Partnership*, 856 F.2d 1068, 1070 (8th Cir. 1988); *see also In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989). Courts must enforce a statute according to its plain terms "except in the 'rare cases [in which] [a] literal application . . . will produce a result demonstrably at odds with the intention of [the] drafters.' " *Ron Pair Enters.*, 109 S. Ct. at 1031 (quoted citation omitted).

In this instance, the relevant legislative history is sparse and it contains no compelling signal that Congress gave the words "any property" in section 1955(d)'s forfeiture provision anything other than their plain meaning. The property owners nevertheless argue that a single exchange between one senator and an assistant attorney general establishes that Congress never intended real property to be forfeited under the statute. We disagree.

During a senate subcommittee hearing considering a bill aimed at curtailing illegal gambling, an assistant attorney general was asked by the subcommittee's chairman for his thoughts on adding "a forfeiture provision that would cover the equipment, adding machines, and money" used in illegal gambling operations. In responding, the assistant attorney general proposed a forfeiture provision containing language – "any property" – that did not exclude real property. The full committee adopted this language and, several months later, forwarded the bill for consideration. Ten months after the gambling bill left the committee, Congress enacted the forfeiture provision leaving the "any property" language intact. *See*

Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803(a), 84 Stat. 922, 938; *see also Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, & S. 2292 Before the Subcomm. on Criminal Laws & Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 397, 412 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 1, 17 (1969).

This legislative history does not show that either the committee or Congress gave the words "any property" anything other than their plain meaning. *See United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part) (when statutory text is unambiguous, we must assume Congress voted on "what the text plainly said"). Indeed, one member of the House remarked during floor debate that the bill's forfeiture provision would permit "any property used in illegal gambling . . . to be seized and subjected to judicial forfeiture procedures." 116 Cong. Rec. H35,295 (daily ed. Oct. 7, 1970) (statement of Rep. Poff).

As the Supreme Court has aptly observed, " '[t]he plain words and meaning of a statute cannot be overcome by a legislative history [that] . . . may furnish dubious bases for inference in every direction.' " *Ex parte Collett*, 337 U.S. 55, 61 (1949) (quoted citation omitted). Even if an isolated encounter between one senator and an assistant attorney general in the early stages of the legislative process raises questions about Congress's legislative intent, the answers to those questions are inconclusive. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *see also Wisconsin R.R. Comm'n v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 589 (1922) (legislative history is "only admissible to solve doubt and not to

create it"). That being the case, we must carry out Congress's purpose by adhering to "the plain language of the statute itself." *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1056 (8th Cir. 1984) (en banc).

The property owners also argue that if Congress had intended to permit the forfeiture of real property under section 1955(d), Congress would have mentioned land specifically in the statute. We disagree. We believe "Congress could not have chosen . . . broader words to define the scope of what was to be forfeited." *United States v. Monsanta*, 109 S. Ct. 2657, 2662 (1989). The words in question here are commonly understood, and "Congress'[s] failure to supplement [section 1955(d)'s] comprehensive phrase – 'any property' – with an exclamatory 'and we even mean [real property]' does not lessen the force of the statute's plain language." *Id.* at 2663 (emphasis omitted). Furthermore, similar forfeiture provisions contained in the 1970 versions of the Racketeer Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) statutes, "which [did] not specifically mention real property, have been interpreted by the courts to provide for the seizure of real property." *614 Portland Ave.*, 670 F. Supp. at 478 (citing RICO and CCE and cases construing original forfeiture provisions of those statutes).

The property owners also point out, as did the defendants in *614 Portland Avenue*, "that even though [] numerous cases [] interpreted both RICO and CCE to allow [] the forfeiture of real property, Congress still felt it necessary in 1984 to amend both statutes to [] include [specific] provisions for the forfeiture of real property." *Id.* The property owners thus argue Congress's failure to

amend section 1955(d) at the same time it amended RICO and CCE shows Congress clearly understood the phrase "any property" did not include real property. We reject this argument for the reasons given in the panel's opinion. *United States v. South Half of Lot 7 & Lot 8*, 876 F.2d 1362, 1366 (8th Cir. 1989).

Finally, the property owners argue that Congress's incorporation into section 1955(d) of customs and admiralty procedural rules relating only to personal property suggests that Congress intended the statute to provide only for the forfeiture of personal property. We agree with the district court in *614 Portland Avenue* that "[t]his argument fails to take into account that in those cases where Congress has chosen [] specifically [to] include real property in the types of property subject to forfeiture, it has nonetheless chosen to apply the procedural rules of the customs and admiralty law[s]." 670 F. Supp. at 477.

Having carefully considered all of the property owners' arguments, we conclude the words "any property" in section 1955(d) plainly permit the government to forfeit real property. We thus reverse the district court's order dismissing the forfeiture actions and remand for further proceedings on the government's complaints for forfeiture.

HEANEY, Senior Circuit Judge, dissenting, with whom LAY, Chief Judge, and McMILLIAN, Circuit Judge, join.

I would affirm the district court for the reasons set forth in this court's panel opinion of June 1, 1989. *United States v. South Half of Lot 7 & 8, Block 14*, 876 F.2d 1362 (8th Cir.), *vacated*, 883 F.2d 53 (8th Cir. 1989).

The majority opinion rejects the fundamental premise of the panel opinion that "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *Id.* at 1365 (quoting *United States v. One Ford Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1938)). It also rejects the view that other federal statutes dealing with forfeiture and the legislative history of the statute indicate that Congress had no intention of subjecting real property, including personal residences, to forfeiture under 18 U.S.C. § 1955(d). I continue to believe this interpretation was thoroughly documented and fully supported in the panel opinion.

I would also affirm the district court for the alternate reason set forth in the panel opinion: The procedures employed by the government in effecting the forfeiture in this case were unconstitutionally deficient. "The deficiency was the failure of the government to obtain a determination from a judicial officer that public cause existed to seize the properties prior to the seizures." *Id.* at 1369. As the author of the opinion, Senior Judge William Hanson, points out: "The warrants allowing the seizure of the property were issued by a deputy clerk based on complaints which merely restated the words of the statute in general cursory allegations." *Id.* at 1370.

The majority in this en banc opinion does not discuss the alternative holding. In the dissent to the panel opinion, however, the author stated that the fourth amendment theory advanced by Judge Hanson was not raised in the parties' motion to dismiss or considered by the district court. I disagree. As noted in the panel opinion, the appellees, in their motion to dismiss, recited as grounds for dismissal the fact that "[t]he warrants allowing the

seizure of the property were issued by a deputy clerk based on complaints which merely restated the words of the statute in general cursory allegations," a failure that "was clearly a constitutional violation putting the seizures beyond those authorized by the law." *Id.* at 1370. Moreover, the district court stated that it is " 'inconceivable' that the statute allows 'the government to seize a person's home as in these cases.' " *Id.* at 1370.

Accordingly, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff VS. PREMISES LOCATED AT HIGHWAY 13/5 PHIL CAMPBELL, ALABAMA (PARCEL 2), PREMISES LOCATED AT 207 WEST WASHINGTON ST., ATHENS, ALABAMA (PARCEL 4); Defendants	)	CIVIL ACTION NO. 89-AR-5451-NW
ROSE MARIE SHARPE and LELAND SHARPE, Claimants to Parcel 2 THOMAS RAY SMITH and ANDY SMITH, Claimants to Parcel 4	)	

MEMORANDUM OPINION

The history and posture of the above-entitled case as of March 12, 1990, is outlined in *U. S. v. Premises Located at 207 W. Washington St.*, 732 F. Supp. 1128 (N.D. Ala. 1990). There is no reason here to repeat what was said there. That opinion suffices as a background and starting point for this opinion.

Originally, the United States undertook to obtain the forfeiture of four widely separated parcels of real property situated within the Northern District of Alabama and alleged to have been used in illegal gambling operations. From the counties in which the parcels were originally alleged to be located, it would appear that Parcels 1, 2 and 3 are located in the Northwestern Division of this court, whereas Parcel 4 is located in the Northeastern Division. The complaint was filed in the Northwestern Division. On March 16, 1990, Thomas Ray Smith and Andy Smith, claimants to Parcel 4, withdrew their objection to the stay which had been granted at the government's request – probably the Smiths withdrew their objection because of this court's opinion of March 12, 1990 – and on March 19, 1990, this court vacated the order which had set a "probable cause" hearing for March 30, 1990. The court reimposed the stay sought by the government but made it clear that a lengthy stay would not be tolerated. The court expressly stated:

> *This stay shall not be indefinite.* It shall be in effect until one of the claimants moves for a removal of the stay or until 4:30 P.M., June 29, 1990, whichever event first occurs.

(emphasis in original).

At an oral hearing had which preceded the order of March 19, the United States was made fully aware of the fact that it could not postpone the indictment of persons it believed to be guilty of criminal conduct for an indefinite period while holding hostage these pieces of real property. The court suggested that if the United States had "probable cause" in September of 1989 (when the civil cover sheet was signed by the Assistant United

States Attorney) to believe that this property, or any of it, had been used for illegal gambling, the United States, no later than June 29, 1990, certainly should have enough evidence to meet its burden of demonstrating "probable cause" to a grand jury. Time passed! The deadline of June 29, 1990 passed. After claimants' motions for summary judgment now under consideration were filed by the Smiths and by Rose Marie Sharpe and Leland Sharpe, claimants to Parcel 2, the United States asked for and was granted an extension within which to respond to the Rule 56 motions, and on August 30, 1990, before this opinion could be written but after the submission date, Andy Smith, one of the four claimants, was indicated by the United States on a charge of illegal gambling. None of the other three claimants has been indicted. The court speculates that one reason the United States asked for the extension is that it would be able to indict at least one claimant before this court could render an opinion on claimants' motions for summary judgment.

The United States had dismissed its claim to Parcel 3 prior to the opinion of March 12, 1990. On June 15, 1990, the United States voluntarily dismissed its claim to Parcel 1, asserting that the balance due on an outstanding mortgage exceeded Parcel 1's market value. This left only Parcel 2 and Parcel 4 in the case.

The words of the complaint have never tried to tie together any of the original four parcels or to explain why parcels so widely separated by geography and by ownership were named defendants in one proceeding. If multifariousness were still a serious law school subject, this complaint would provide a good example for classroom discussion. The United States obviously believes

(and it may be correct) that *one hundred separate parcels,* connected in no way except by the fact that each was allegedly used at some time to facilitate an illegal gambling operation, can be named *in rem* defendants in a single forfeiture proceeding, so long as the one hundred parcels are located within the same federal judicial district. The Northern District of Alabama contains 31 counties. With as many professional gamblers as are probably plying their trade within the Northern District of Alabama, theoretically, under the government's theory, a hundred separate parcels in one forfeiture action may be more than a *theoretical* possibility.

Parcel 4 was seized under a warrant of arrest which contained a legal description somewhat different from the description in the order of seizure of October 4, 1989, and the legal description was quite materially amended thereafter without any further order of seizure or *in rem* process. The pertinent procedural details will be explored more thoroughly in the later discussion of the applicable law. The United States has never attempted to justify or to explain its amendment of the legal description of Parcel 4 after the arrest warrant. Neither has it attempted to justify its not obtaining an amended arrest warrant or a new forfeiture order employing the substitute legal description. Lastly, it has not attempted to justify its failure to obtain a new order for publishing notice against Parcel 4 as finally described by metes and bounds.

After the deadline of June 29, 1990, without having heard anything from the United States, the court, on July 3, 1990, set the matter for a status and scheduling conference. At this conference, held on July 25, 1990, the court pointed out in no uncertain terms that both Parcels 2 and

4 had been seized in October of 1989, and that by order of October 4, 1989, title was tentatively vested in the United States without any pre-seizure hearing having been conducted and without the United States ever thereafter having formally charged any of claimants with involvement in an alleged illegal gambling business in violation of 18 U.S.C. § 1955. The court orally expressed severe reservations about the government's case in several respects.

On July 12, 1990, the Smiths filed their motion for summary judgment. On July 27, 1990, the Sharpes filed their motion for summary judgment. On August 2, 1990, the United States moved for its extension of the submission date, and with claimants not objecting, the extension was granted. In its motion for an extension, the United States said nothing about its intention to obtain an indictment during the period of the extension, but in its last-day response to claimants' motions for summary judgment filed on August 27, 1990, the United States revealed that it did intend to present a case to the grand jury against Andy Smith during the week of August 27. This court takes judicial notice of the subsequent fact that Andy Smith was indicted on August 30, 1990.

The Smith brothers own Parcel 4 together. The Sharpes, who are husband and wife, own Parcel 2 together. Both sets of claimants have paid the ad valorem taxes due on their respective properties. Of course, if the properties are legally owned by the United States, they are exempt from state, county, and municipal taxes. Since the seizure of Parcel 2, the Sharpes have made their regular mortgage payments due Manufacturers Hanover

Bank, which holds a first mortgage on Parcel 2. Manufacturers Hanover has filed a claim in order to protect its lien. Colonial Bank, which holds a second mortgage on Parcel 2, has also filed a claim. It goes without saying that the titles to both parcels have been unmarketable since October 2, 1989. The Sharpes do have a written agreement with the United States by which they can remain in possession during this proceeding. The Smiths, who run a clothing store located in Parcel 4, have no such agreement, so that under this court's order of October 4, 1989, the United States can forcibly remove the Smiths from Parcel 4 at any time.

Claimants, who in this civil case can invoke Rule 56, F.R.Civ.P., if the rule is appropriate, make several arguments in support of their contentions that these undisputed material facts require a final disposition in their favor, divesting the United States of all right, title, claim and interest in and to these two parcels of real property. Claimants' various contentions in this regard, and the counter-arguments of the United States, will be analyzed separately.

Does 18 U.S.C. § 1955 Subject Real Property to Forfeiture?

The Eleventh Circuit has not spoken on the question of whether or not 18 U.S.C. § 1955 is a vehicle for the forfeiture of *real* property. During oral argument, the court pointed out to the parties something none of them apparently knew, namely, that *U.S. v. South Half of Lot 7 and Lot 8, Block 14*, 876 F.2d 1362 (8th Cir. 1989), had been vacated and an *en banc* rehearing ordered by the Eighth

Circuit. In fact, the parties seemed to have little familiarity with that case or with the other case on point, *U.S. v. Premises and Real Property 614 Portland*, 846 F.2d 166 (2d Cir. 1988). The Eighth Circuit panel opinion, prior to its being vacated, had held, contrary to the Second Circuit's cursory opinion, that 18 U.S.C. § 1955(d) does not authorize the forfeiture of *real* property even though the property is clearly proven to have been used for illegal gambling. On August 3, 1990, the Eighth Circuit finally filed its *en banc* opinion on rehearing. This opinion reverses the panel and now holds that 18 U.S.C. § 1955(d) *does* make real property, as well as personal property, an object for forfeiture. Chief Judge Lay and Judges Heaney and McMillian dissented for the reasons stated by the majority in the earlier panel opinion. *See U.S. v. South Half of Lot 7 and Lot 8, Block 14*, ___ F.2d ___, 1990 LEXIS 13312 (8th Cir. 1990). Although the United States was granted an extension of the date for submission of claimants' motions for summary judgment, the United States has not discussed the current status of the law respecting whether or not § 1955(d) reaches *real* property. If the United States thinks the matter is settled, this court respectfully disagrees.

The only reason this court brought up *U.S. v. South Half of Lot 7 and Lot 8, Block 14* during oral argument is that this court was tentatively persuaded by the logic of the Eighth Circuit panel majority, which now represents the Eighth Circuit minority. Not only does this court agree with the ultimate dissenters of the Eighth Circuit, but it agrees with the Eleventh Circuit in *U.S. v. $38,000*, 816 F.2d 1538, 1547 (11th Cir. 1987), which joins the Eighth Circuit dissenters in holding that forfeitures are

not favored in the law and should be enforced only when within both the letter and spirit of the law. The Eighth Circuit minority correctly cites *U.S. v. One Ford Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 865 (1938) for this same proposition. This court also believes that criminal conduct by a property owner is the *sine qua non* for any proposed forfeiture of his property. *Adequate* procedures must be *strictly* followed. Lastly, this particular forfeiture statute has a quasi-criminal character and must be construed under the rule of lenity, giving the benefit of any doubt to the putatively accused. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247 (1980). As pointed out in *U.S. v. U.S. Currency*, 626 F.2d 11, 18 (6th Cir. 1980), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529 (1980), § 1955(d) appears *within the criminal code* and "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal for Fifth Amendment purposes." (quoting from *U.S. v. U.S. Coin & Currency*, 401 U.S. 715, 718, 91 S.Ct. 1041, 1043 (1970).

Without any Eleventh Circuit or Supreme Court precedent to look to, this court must look to the general rules of statutory construction and to its own sense of rectitude, and it must evaluate the opinions of the Second Circuit and of the two factions of the Eight Circuit based on their competing persuasive qualities. As already confessed, this court is persuaded by the logic of the Eighth Circuit dissent and therefore finds that § 1955(d), which nowhere uses the term "real property," was not available to the United States in this instance as a statutory vehicle for forfeiture.[1]

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[1] The court notes that on August 23, 1990, the Eighth Circuit claimants in *South Half of Lot 7 and Lot 8, Block 14* asked

(Continued on following page)

Assuming ***Arguendo*** *That § 1955(d) Permits The Forfeiture of Real Property, Are Parcels 2 and 4 Being Taken Without Due Process of Law?*

Inter alia, the Fifth Amendment provides that "no person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

Early in this case, the Smiths filed a motion pursuant to Rule 12(b)(6), seeking a dismissal of the action. Their motion was overruled, although it possessed arguable merit. None of the claimants has waived possible procedural shortcomings by the United States or possible constitutional or statutory defects in the forfeiture procedures. Has the government provided "due process"?

The Eleventh Circuit has revealed very plainly its insistence that all constitutional, statutory, and administrative procedural requirements be followed to the letter in forfeiture proceedings. The leading case is *United States v. $38,000, supra,* wherein the Eleventh Circuit said:

> . . . the application of these rules [the Supplemental Rules for Certain Admiralty and Maritime Claims] to section 881 forfeitures [and § 1955 forfeitures?], has created a procedural morass – a morass in which the parties to the instant action became hopelessly entangled.

816 F.2d at 1540.

* * *

(Continued from previous page)

the Eighth Circuit for a stay of the mandate, suggesting an intention to petition the Supreme Court for a writ of certiorari.

> Courts consistently have required claimants to follow the language of the Supplemental Rules to the letter. We see no reason to apply a less stringent standard to the government when it seeks forfeiture. If anything, the burden on the government to adhere to the procedural rules should be heavier than on claimants. Forfeitures are not favored in the law; strict compliance with the letter of the law by those seeking forfeiture must be required.
>
> Applying the plain language of the Supplemental Rules, we conclude that the government never properly executed process.

Id. at 1547 (citations and footnotes omitted).

* * *

> Moreover, even were we tempted in some cases to permit the government to remedy a past procedural error by obtaining a warrant, we are not so inclined in the instant case.

Id. at 1547, n. 19.

> We are not unsympathetic to the government's strong desire to eradicate drug trafficking [illegal gambling?]: we recognize that illegal drugs pose a tremendous threat to the integrity of our system of government. *We must not forget, however, that at the core of this system lies the Constitution, with its guarantees of individuals' rights.* We cannot permit these rights to become fatalities of the government's war on drugs [illegal gambling?].

Id. at 1548-49.

As the Eleventh Circuit made clear in *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987), 822 F.2d 998 (11th Cir. 1987), and the cases cited therein, a pre-judgment seizure of property without any pre-seizure hearing

raises severe "due process" concerns. This is the main thrust of the very recent *U.S. v. A Leasehold Interest in Property Located at 850 S. Maple, Ann Arbor, Washtenaw County, Mich.*, ___ F.2d ___, 1990 WL 107846 (E.D. Mich. 1990), in which Chief Judge Cook relied on a local rule which requires that in *in rem* actions the party seeking the seizure certify to the court *prior* to the contemplated action that "exigent circumstances" exist which would made a pre-judgment review "impractical." Judge Cook found the seizure there to have violated this rule and "due process" standards. The wise local rule of the Eastern District of Michigan is very similar to the rule recognized by the Eleventh Circuit in *Jones v. Preuit & Mauldin* and runs parallel with the thinking of the Supreme Court of Alabama in *Reach v. State of Alabama*, 530 So. 2d 40 (Ala. 1988), cited by the Smiths. Perhaps one of the most recent cases on point is *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990), in which the Second Circuit finds that Connecticut's statute purporting to permit the pre-judgment attachment of real property upon a plaintiff's *ex parte* showing that there is probable cause to sustain the validity of the claim violates "due process" because it did not contain the further requirement of "extraordinary circumstances." This is both reminiscent of the local rule of the Eastern District of Michigan and of *Jones v. Preuit & Mauldin*.

It would be strange indeed if more "due process" is required of the fifty states under the Fourteenth Amendment than is required of the United States under the Fifth Amendment.

Parcel 4 was actually seized under an order entered on October 2, 1989, describing Parcel 4 as follows:

> Commence at the NE corner, Block 33, then West 66 feet to point of beginning continuing West 22 feet, South 135 feet, East 22 feet, North 135 feet, West 22 feet to point of beginning; also commencing at the NE corner, Block 33, then South 330 feet, West 210 feet to point of beginning continuing West 21 feet, North 20 feet, East 21 feet, South 20 feet to point of beginning in Section 8, Township 3, Range 4, Limestone County, Alabama.

Then, in the immediately following warrant addressed to the United States Marshal, Parcel 4 was described as follows:

> Commence at the NE corner, Block 33, then West 66 feet to point of beginning continuing West 22 feet, South 135 feet, East 22 feet, North 135 feet, West 22 feet to point of beginning; also commencing at the NE corner, Block 33, then South 330 feet, West 210 feet to point of beginning continuing West 21 feet, North 20 feet, East 21 feet, South 20 feet to point of beginning in Section 8, Township 3, Range 4, Limestone County, Alabama.
>
> Situated, lying and being in the NE 1/4 of NE 1/4 of Section 17, Township 8 South, Range 11 West, Franklin County, Alabama.
>
> EXCEPTIONS AND RESERVATIONS: (1) The easement 45 feet in width above described is a non-exclusive easement which is also access to the adjoining property on the South Side.

The first legal description of Parcel 4 employed by the government clearly placed the property in Limestone County, whereas the description in the warrant is both different and ambiguous in that, for the first time, it strangely mentions Franklin County. This ambiguity may explain the need to amend the description of Parcel 4 in

an amendment to the complaint filed on October 19, 1989. That amendment finally describes Parcel 4 as follows:

> A store house and lot in the City of Athens, Alabama, described as beginning at a point on the south property line of Washington Street 66.6 feet West of the Northeast corner of Block No. 33, according to the map of said City made by Henderson & Carter in the year 1897, and running thence from the point of beginning West along Washington Street 22 feet, thence South parallel to Marion Street 167.8 feet to the J. W. Calvin line, thence east with it 22 feet, thence north 167.5 feet to the point of the beginning.
>
> ALSO, all that part of the following described strip of land which lies immediately South of the above described tract: A strip of land off of the North side of Lot No. 8 (being between a brick building and the South boundary of Lot No. 9, fronting 1 foot and 2 inches on Marion Street and running back to the rear of said lot to a point on the boundary line between Lots 7 and 8, 9 inches South of the Northwest corner of said Lot No. 8, the said strip so conveyed is off of the North side of said Lot and is 1 foot and 2 inches wide on the East boundary and 9 inches wide on the West boundary of said Lot 8. It is not the intention to convey any part of the North wall of the brick building situated on said lot, nor any of the land upon which the said building is situated.
>
> The above described property is subject to an alley running through the Southern part thereof described as follows:
>
> Beginning at a point 21½ feet North of the Northeast corner of Lot. No. 8 of Block 33, according to the 1914 Map of the City of Athens, Alabama, said beginning point being at the

> Northeast corner of a brick building and running thence North 11½ feet to the North side of the alley, thence West with the North line of said alley to the West line of Lot 13 of Block 33, thence South 11½ feet to a point 21½ feet north of a northwest corner of Lot 7 of said Block 33 and running thence East with the South line of said alley to the point of beginning, being a strip 11½ feet wide running East and West through the North half of said Block 33 from South Marion Street to South Jefferson Street, the intention being to except only that portion of the property now used as a public alley, and it being the further intention that the property hereby described does not encroach upon any existing building.

Unfortunately for the United States, this amendment of October 19, 1989, not only fails to mention the county in which the parcel is located so as to place it in the Northern District of Alabama, but it contains no verification. It is impossible from the file to determine what legal description, if any, was actually used by the U. S. Marshal in serving his *in rem* notice or in his notice as published in the four separate newspapers order by the court on October 2, 1989. In fact, there is no indication at all that there was any service of process whatsoever of the amendment of October 19, 1989. Not until March 14, 1990, two days after this court's opinion of March 12, 1990, did the Marshal finally make a purported return indicating that he had published notice in the four newspapers ordered by the court five months earlier; however, the said return conspicuously did not attach copies of the newspaper notices themselves, much less verified copies. Therefore, it is impossible to ascertain the legal descriptions which were used in any publication of notice, or the actual

content of the notices. For aught appearing, the notices involving Parcels 2 and 4 as published did not contain any specification of a time within which claimants must answer or file a claim. Thus, the "procedural morass" spoken of in *U.S. v. $38,000*, a case which, interestingly, the United States itself cited and acknowledged in its original motion asking for a warrant of arrest as a self-admonition to dot its "i's" and to cross its "t's" engulfed the case from its inception. No title insurance company in its right mind would insure the title to a purchaser at a Marshal's sale or Parcel 2 or Parcel 4 based such a record until the last appellate avenue is exhausted by every claimant.

In passing, the court points out that § 1955 makes no distinction between real properties according to their size or value, assuming, that is, that real property is vulnerable to forfeiture. According to the United States, a 100,000 acre ranch can be forfeited if a few cowboys, with the rancher's knowledge, use the bunk house for a state precluded card game; or the Empire State Building can be forfeited if one of its tenants, with the owner's knowledge, sells lottery tickets while selling even riskier securities. This is another good reason why Congress probably did not intend to include *real* property as property forfeitable under § 1955, even thought this reason was not articulated by the Eighth Circuit dissenters.

The Smiths have complained that a sizeable sum of money and bonds was seized along with Parcel 4. The court is without jurisdiction to consider their complaint in this regard, but they raise a question, here pertinent, raised by defendant in *United States v. Noriega*, ___ F. Supp. ___, 1990 WL 95529 (S.D. Fla. 1990), in which the

defendant successfully claimed that leaving an accused with only the clothes on his back, so as effectively to deny him competent counsel, denies him the "due process" guaranteed by the Fifth Amendment. In *Noriega*, the learned trial judge found that the use of the forfeiture statute had not only deprived defendant, as practical matter, of the opportunity to contest the government's pre-trial restraint of his assets but had also deprived him of assets needed to retain the counsel guaranteed him by Sixth Amendment. Now that Andy Smith has been indicted three days after his motion for summary judgment came under submission, the *Noriega* case takes on meaning in this case that it did not previously have. Although *Noriega* can be distinguished factually from this case, the passage of nearly a year from the date of the seizure of Parcels 2 and 4 without any indictment except for the recent indictment of Andy Smith, but with a serious interim need for competent civil and criminal counsel by all four property owners, does implicate the "due process" clause of the Fifth Amendment.

Often the question of whether or not a particular seizure has been accomplished while at the same time affording "due process," is a difficult one. This court believes in this case that the taking of the Smiths' and the Sharpes' real property for nearly a year without the government's being in a position honestly to request a final hearing on the question of "probable cause," and, to the contrary, being required to request a stay, does not comply with the requirements of "due process."

In *U.S. v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 103 S.Ct. 2005 (1983), cited by the government in its brief, the Supreme Court spoke to the

reasonableness of a delay in the *filing* of the forfeiture action. The Court there adopted the test in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), for the "speedy trial" right. Of course the right to a speedy trial is not directly implicated until an indictment is handed down, as is not the situation with respect to Andy Smith. However, when a prospective criminal defendant has his real property seized without any opportunity, as a practical matter, for obtaining a "due process" hearing for nearly a year, the reasonableness of the delay, analogous to the requirement of a "speedy trial," must become a factor in the "due process" analysis. This is particularly true in this case, where the court actually warned the United States that it must step more lively or risk a dismissal.

In its brief responding to claimants' separate motions for summary judgment, the government argues that the claimants have not shown any *prejudice* from the delay; that the delay "was not unjustified"; and that "accordingly, no due process violation has occurred." Government's brief, p. 5. The same brief admits that Parcel 4 "contains a family-run business that has been in operation for approximately seventy years." Government's brief, p. 9. The Smiths' business is a clothing store, for which it is commonly understood to be impossible, as a practical matter, to buy merchandise to prepare for the various fashion seasons while a sword of Damocles hangs over the business. There is a gracious plenty of prejudice to the Smiths resulting from the delay in the final title quieting to Parcel 4, without even considering the fact that the Smiths have been paying taxes and maintaining the premises for nearly a year while the sword dangles. The fact that Andy Smith has now been indicted can only

cause further prejudicial delay, especially if he is convicted and takes an appeal. Thomas Ray Smith, the joint owner with his brother, neither has been indicted nor granted immunity. Yet, he could be dispossessed tomorrow if the government chooses. As to Parcel 2, the prejudice to the Sharpes resulting from the delay is even more conspicuous, despite the stipulation for continued occupancy. Neither Sharpe has been indicted. If the forfeiture of Parcel 2 is validated, the Sharpes have for eleven months only been building equity for the government by making the mortgage payments. Both of the mortgages on Parcel 2 have, through counsel, filed claims. Who does the government think will pay the attorney's fees resulting from these lenders' having to employ lawyers to file these claims, even if the Sharpes are eventually successful? Every monthly mortgage payment, and every payment of taxes, constitutes "prejudice" in that the payments would not have been made by the Sharpes if the government legally owns Parcel 2; and the government has notably not offered to make the tax and mortgage payments in order to protect it against foreclosure of admittedly valid mortgages. Although the government has come close to promising that it will indict Leland Sharpe in the near future, it does not offer his wife immunity or any realistic opportunity for a "probable cause" hearing in the near future, or an opportunity to prove her personal innocence.

The government would excuse the delay in the "probable cause" hearing by its unverified assertion that "it took approximately eight months for the plaintiff to prepare copies of the numerous tape recordings and transcripts of federal wiretaps, generated as a result of the

related criminal investigation . . . " Government's brief, p. 4. This court finds this assertion both incredible and inexcusable. It either indicates little or no regard for claimants' property rights or that the government investigators and their stenographers have been too slow. There cannot be a different "due process" standard for litigants, one for the government and another for property owners. If there is to be a difference, the more stringent "due process" standard must apply to the government, because the Fifth Amendment constitutes a limitation on the government.

What is the Effect on "Due Process" of the Self-Incrimination Aspect Of the Fifth Amendment?

The Fifth Amendment not only requires that the government afford "due process" and pay "just compensation" before any taking of private property, but it says: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . . " In this case, the "due process" and the "self-incrimination" provisions of the Fifth Amendment are so intertwined as to be inseparable. They must be examined as a unit.

Either the United States requested the stay of the "probable cause" hearing because it was unprepared to pursue its civil case (its original affidavits are, in large part, hearsay), or, more likely, because it recognized that a criminal target cannot be placed in the position of having to make the Hobson's choice between relinquishing valuable real property on the one hand, and seriously exposing himself to possible self-incrimination on the other. The United States cannot be heard to argue that it

has an unlimited amount of time within which to prosecute a person for alleged illegal gambling, while at the same time claiming to own that person's real property because of the gambling activity. Such a criminal target is effectively blocked from pushing the forfeiture proceeding to an expeditious conclusion by his reasonable choice to exercise the crucially important constitutional privilege against self-incrimination. In *Pervis v. State Farm Fire and Cas. Co.*, 901 F.2d 944 (11th Cir. 1990), the Eleventh Circuit recently reiterated the obvious principle that the Fifth Amendment shields a defendant in a civil case from having to submit to interrogation if his testimony might tend to incriminate him, even though his refusal has the effect of interrupting the progress of the civil action. This principle, of course, does not apply if the potential criminal target is the *plaintiff* in the civil action. In this particular civil forfeiture proceeding, however, the *government* is the *aggressor,* so that the Smiths and the Sharpes enjoy the absolute Fifth Amendment shield, and cannot be criticized, as the government's brief implicitly does, for holding up that shield.

The Sixth Circuit in *United States v. U.S. Currency,* 626 F.2d 11 (6th Cir. 1980), dealt specifically with a forfeiture undertaken under 18 U.S.C. § 1955. The Sixth Circuit concluded, with compelling logic and authority, that occasions do exist in which the constitutional privilege against self-incrimination precludes the effectuation of the § 1955 forfeiture scheme.[2]

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[2] [W]hile *Coin and Currency* [401 U.S. 715, 91 S.Ct. 1041 (1971)] obviously concerns certain of the issues presented

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In *U.S. Currency*, the Sixth Circuit suggested, as an alternative solution to the problem, that is, if the problem

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before this court – specifically, self-incrimination in the forfeiture context – *Coin and Currency* does not control, nor mandate dismissal of, the case at bar without any trial as ordered by the District Court.

It is clear, however, that there are genuine threats to appellees' privilege against self-incrimination in the matter sub judice. Our focus must turn, then, to whether such threats justify dismissal of the forfeiture proceeding, or whether, as the appellant suggests, there may be "a solution which both protects the privilege and permits the forfeiture case to go forward."

The government states:

> . . . appellees have the right to invoke the privilege against self-incrimination. If follows from this that no sanction may be imposed as a result of relying on the privilege. . . . We recognize that it would be a deprivation of fundamental rights to prevent appellees from attempting to prove their claims to the property merely because they may legitimately invoke their Fifth Amendment rights with respect to some of the questions in the interrogatories filed below. By this we mean that appellees should not have to choose between waiving their privilege against self-incrimination in order to satisfy their burden of proof, and remaining silent, thereby giving up the opportunity to prove their claims to the property at issue in this case. Brief p. 9.

Therefore, the government concedes that the appellees do have a privilege against self-incrimination in this situation, and seems to acknowledge, in its brief and at argument, that the

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is solvable, that the government grant claimants immunity from prosecution in exchange for the right to

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court below was correct in ruling that appellees were not required to answer the interrogatories. The government vigorously maintains, however, that the District Court erred in dismissing the forfeiture action without any trial.

It is settled that "a witness in a . . . civil . . . proceeding may decline to answer questions when to do so would involve substantial risks of self-incrimination." *United States v. Parente*, 449 F. Supp. 905, 907 (D. Conn. 1978); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1086 (5th Cir. 1979). "Although the proceeding in which the privilege is asserted need not be criminal, the information for which the privilege is claimed must harbor the potential of exposing the speaker to a criminal or quasi-criminal charge." *In re Daley*, 549 F.2d 469, 478 (7th Cir.), *cert. den.*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977). Indeed, "it is only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well-taken." *In re Folding Carton Anti-trust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979). As the court in *United States. v. Powe*, 591 F.2d 833, 845 n. 36 (D.C. Cir. 1978) has explained, the "privilege operates where the information sought to be extracted presents 'a realistic threat of incrimination' . . . as distinguished from 'a mere imaginary possibility.' " See also *Wehling, supra* at 1087 n.5. It is evident here that appellees face a very "realistic threat of incrimination."

The Supreme Court has declared that:

> . . . government cannot penalize assertion of the constitutional privilege against self-incrimination by imposing sanctions to compel testimony which has not been immunized . . . the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which

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proceed with the forfeiture action. No such suggestion has come from the United States in the instant case.

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> the Amendment forbids." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132, 2136, 53 L.Ed.2d (1977).

See also *SEC v. Gilbert*, 79 F.R.D. 683 (S.D. N.Y. 1978). "The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another." *Wehling, supra* at 1088. Further, "a prosecutor may not circumvent a person's privilege against self-incrimination by invoking a civil remedy to enforce a criminal statute." *Childs v. McCord*, 420 F. Supp. 428 433 (D. Maryland 1976), *aff'd* 556 F.2d 1178 (4th Cir. 1977). As the Seventh Circuit explained in *Ryan v. C.I.R.*, 568 F.2d 531, 542 (7th Cir. 1977), *cert. den.*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978), " . . . the forfeiture penalty is closely related to a criminal sanction, and the privilege against self-incrimination is operative." The forfeiture cases have served to "extend the Fifth Amendment privilege to proceedings which, although civil in form, involve the enforcement of a statute 'intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.' " *Childs, supra* at 434.

Furthermore, as the Fifth Circuit has observed, "under the federal discovery rules, any party to a civil action is entitled to all information relevant to the subject matter of the action before the court *unless such information is privileged*. Fed.R.Civ.P. 26(b)(1). Even if the rules did not contain specific language exempting privilege information, . . . the Fifth Amendment would serve as a shield to any party who feared that complying with discovery would expose him to the risk of self-incrimination." *Wehling, supra* at 1086 (original emphasis); see also *Ryan, supra* at 538.

In the instant appeal, the Government has said:

> Due to the peculiar nature of a forfeiture action, in which the burden of proof shifts to a claimant after

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Another, if weaker, alternative is a stay of the civil case until the completion of the criminal prosecution, but such

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> the government has shown probable cause for the complaint, we agree that appellees could not, in proper circumstances, be forced to surrender the privilege (against self-incrimination in) answering the complaint and offering evidence in support of their claims to the property. Brief p. 8.

This court recognized the "peculiar nature" of such proceedings in *Colonial Finance Co. v. United States*, 210 F.2d 531, 533 (6th Cir. 1954), noting that, in forfeiture actions, " . . . when probable cause had first been shown for the institution of such suit or action, to be adjudged by the court, the burden of proof shall lie upon the claimant."

The court in *Tom v. Twomey*, 430 F. Supp, 160, 163 (N.D. Ill. 1977), considered some of the procedural aspects of forfeiture under the statute involved herein:

> The forfeiture of any property used in violation of 18 USC 1955(a) is governed by the custom laws. 18 USC 1955 (d). In the law of customs, if an action in rem is brought to forfeit a vehicle, the owner on being notified of the proceeding . . . is required to file a timely answer to the government's complaint, under oath . . . The answer should set out clearly and explicitly the facts relied on . . . And the failure to deny by answer is an admission.

Along the same vein, Judge Feikens, in view of the analogous situation presented in *Backos v. United States*, 82 F.R.D. 743, 745 (E.D. Mich. 1979), expressed concern that:

> . . . by refusing to testify, plaintiffs will hurt their claim because they will be deprived of whatever benefit their own evidence might provide. Moreover,

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an alternative presupposes the beginning and ending of the criminal prosecution *within a reasonable period of time.* And, considering the fact that two of these claimants apparently are never going to be prosecuted, and that those who are going to be prosecuted have the right to appeal from a conviction without waiving their Fifth Amendment right, the reasonableness of the delay under the eye of the Fifth Amendment's privilege against self-incrimination becomes even more questionable.

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> . . . the government may be able to draw an adverse inference from plaintiff's refusal to testify.

The foregoing demonstrates that, especially in light of the posture of a forfeiture proceeding, in which the defendant actually has the burden of proof, the appellees here have the unenviable choice of incriminating themselves, or, of failing to file an answer, under oath, to the government's complaint and failing to vigorously pursue their claims to the currency.

Clearly, appellees should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding. On the other side of the coin, however, the government should not be compelled to abandon the forfeiture action which Congress, by enacting the statute, obviously intended to create. Therefore, the courts must seek to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the forfeiture provision.

There may be occasions when the constitutional privilege totally precludes effectuation of the statutory forfeiture. In other words, it is possible that, under certain circumstances, forfeiture would be impossible without impermissibly impinging upon the Fifth Amendment privilege, and, although it does not appear so to this court, this may be one such situation.

Id. at 14-16.

Another problem inhering in a lengthy *stay* as the "solution" to the Fifth Amendment problem is that if the property owner should be convicted he automatically becomes collaterally estopped from interposing his "innocent owner" defense in the civil case. *See U.S. v. One Rural Lot Located at Calle Principal (a) No. 296,* ___ F. Supp. ___ (D. Puerto Rico, June 19, 1990). Another Hobson's choice? It may be good strategy in the criminal case to choose not to testify in light of the presumption of innocence and the fact that the government has the burden of proving guilt beyond a reasonable doubt, whereas in the civil proceeding the government's burden is much lighter and, if met, the owner has the burden of proving the essential elements of his claim by a simple preponderance of the evidence. The bargaining power of the accused in his criminal case is materially diminished by the pendency of the forfeiture proceeding if the forfeiture scheme is employed as in this case. If this was what the Congress has in mind, it was overstepping the constitutional constraints on prosecutorial freedom.

Although not in the context of a forfeiture, in analogous Internal Revenue Service civil enforcement proceedings under 26 U.S.C. § 7602, courts have barred a civil proceeding once the IRS has referred the matter to the Department of Justice for criminal prosecution. *See U.S. v. Michaud,* 907 F.2d 750 (7th Cir. 1990). The Seventh Circuit in *Michaud,* recognized that civil proceedings cannot continue after criminal proceedings begin without violating the privilege against self-incrimination. The principle is simple and easy to understand. The Fifth Amendment cannot be swept under the rug, either by the courts or by Congress, simply in the name of convicting law violators.

Perhaps the most recent case closely paralleling the instant case is *In re Ramu Corp.*, 903 F.2d 312 (5th Cir. 1990). In *Ramu*, the Fifth Circuit severely criticized the United States for seizing real property owned by unindicted persons and then procuring the trial court to put "on hold" the forfeiture proceeding pending the outcome of a criminal case. The only real difference between *Ramu* and this case is that the proposed forfeiture in *Ramu* was under the Comprehensive Drug Abuse Prevention and Control Act, which in 21 U.S.C. § 881(i) expressly *permits* a stay of the forfeiture proceeding related to a drug offense for which there has been an indictment and for which the government can show *good cause*. The forfeiture statute here invoked for a gambling violation *contains no such provisions*. Yet, even in *Ramu* the Fifth Circuit found that the United States failed to satisfy the requirements for a stay pending the criminal narcotics prosecution, because the government had not shown that no substantial harm would be suffered by the property owner as a result of the stay. In the case before this court the United States has offered no more than its bald assertion that it needs more time to complete its investigation in order to prosecute. This explanation does not satisfy the two different Fifth Amendment concerns articulated so well in *Ramu* and in $38,000, much less both concerns in combination.

Conclusion

The United States, perhaps with inadvertent Congressional help, has, to use the Eleventh Circuit's words in $38,000, become entangled in a procedural morass from which it cannot extricate itself, that is, without this

court's unwanted help. For the separate and several reasons discussed above, this court will pull the United States from its tar baby and will grant claimants' motions for summary judgment.

DONE this 12th day of September, 1990.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. TAX LOT H, SECTION 6, TOWNSHIP 13 NORTH, RANGE 13 NORTH, RANGE 13 EAST OF THE 6TH P.M., SARPY COUNTY, NEBRASKA, ALSO KNOWN AS 12303 SOUTH 60TH STREET, OMAHA, NEBRASKA 68133 WITH ITS BUILDINGS AND APPURTENANCES, Defendant(s).	)	CIVIL 88-0-219 COMPLAINT FOR FORFEITURE (FILED MAR 15, 1988)

The United States of America, by and through the United States Attorney for the District of Nebraska, in the civil cause of forfeiture, alleges upon information and belief;

1. That the Court has jurisdiction under 28 U.S.C. § 1345, 1355, 1356 and 1395, and 18 U.S.C. § 1955(d).

2. That the defendant real property with buildings and appurtenances, valued in excess of $10,000, has a legal description as follows:

> Tax Lot H, Section 6, Township 13 North, Range 13 East of the 6th P.M., Sarpy County, Nebraska.
>
> Also known as 12303 South 60th Street, Omaha, Nebraska 68133.

3. That defendant property is now and during the pendency of this action in the judicial district of Nebraska.

4. That the defendant property has as its owner of record, Wilbert P. Feiste and Sharon Z. Feiste, husband and wife.

5. During December, 1987, and January, 1988, Wilbert P. Feiste was engaged in the conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955.

6. That the premises, Tax Lot H, Section 6, Township 13, North, Range 13 East of the 6th P.M., Sarpy County, also known as 12303 South 60th Street, Omaha, Nebraska, 68133, with its buildings and appurtenances thereon, was used for the purpose of conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business as listed in paragraph 5 above.

7. That the defendant real property was used in violation of the provisions of 18 U.S.C. § 1955(a). Therefore, defendant property is subject to forfeiture to the United States of America and no other property rights shall exist in it.

WHEREFORE, plaintiff, United States of America, prays this Honorable Court to adjudge and decree as follows:

1. That defendant property be proceeded against for forfeiture in accordance with the laws and regulations of the rules of this Court and that due notice be given to all interested parties to appear and show cause why forfeiture should not be decreed.

2. That the Court for the reasons set forth herein above, order, adjudge and decree that said property be

condemned as forfeited to the United States of America and disposed of according to law and regulations and that the Court provide such other relief as is just and appropriate.

3. That costs of said action be assessed against the defendant.

UNITED STATES OF AMERICA

By: RONALD D. LAHNERS
United States Attorney
District of Nebraska

And: /s/ Steven A. Russell
STEVEN A. RUSSELL
Assistant U. S. Attorney
520 Federal Building
100 Centennial Mall North
Lincoln, NE 68508
Telephone: 402-437-5241

VERIFICATION

STATE OF NEBRASKA)
)
COUNTY OF LANCASTER)

Pursuant to Rule C(2), Supplemental Rules of Civil Procedure, Steven A. Russell, Assistant United States Attorney for the District of Nebraska, being first duly sworn, states that the facts set forth in the foregoing Complaint are true and correct according to the best of his knowledge and belief.

/s/ Steven A. Russell
STEVEN A. RUSSELL
Assistant U.S. Attorney

Subscribed and sworn to before me this 11th day of March, 1988.

A GENERAL NOTARY-
State of Nebraska
By Marcia L. Stewart
My Comm. Exp. Febr. 6, 1989

/s/ Marcia L. Stewart
Notary Public

Pursuant to the rules of this Court, the United States of America hereby requests that trial of the above and foregoing action be held at Omaha, Nebraska, and that it be calendared accordingly.

/s/ Steven A. Russell
STEVEN A. RUSSELL
Assistant U. S. Attorney

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue

in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization

except as compensation for actual expenses incurred by him in the conduct of such activity.

(Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.)

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping [sic], gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to Interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor

organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the

United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under the State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978,

92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677).

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the

remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

§ 848. Continuing criminal enterprise

Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine or not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States –

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code. secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section as they shall deem proper.

Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.